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IN THE

Supreme Court of the United States

October Term, 1975

No. 75- 853

HOWARD PIPER, THOMAS F. PIPER and WILLIAM T. PIPER, JR.,

Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 5, 1975

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HOWARD PIPER, THOMAS F. PIPER and
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v.

CHRIS-CRAFT INDUSTRIES, INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Howard Piper, Thomas F. Piper and William T. Piper, Jr. ("the Piper individuals") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 11, 1975.

Opinions Below

The opinion of the Court of Appeals (A-1)* reversing the United States District Court for the Southern District of New York after trial and finding liability is reported at 480 F.2d 341. Its subsequent opinion (B-1) reversing the District Court's determination after trial of the amount of

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* Each of the opinions below is reprinted in full in a separate volume of Joint Appendices A through E submitted herein. Page references beginning with "A", "B", "C", "D" or "E" are to that volume.

damages is reported at 516 F.2d 172. The opinion of the District Court after the first trial on liability is reported at 337 F. Supp. 1128 (A-125) and its opinion after the trial on remand to assess damages is reported at 384 F. Supp. 507 (B-43).

Earlier opinions of the Court of Appeals (C-1) and the District Court (C-32) relating to an application for a preliminary injunction are reported at 426 F.2d 569 and 303 F. Supp. 191, respectively. In addition, there were related cases, to which the Piper individuals were not parties, reported at 331 F. Supp. 1154 (D-1) and 337 F. Supp. 1147 (D-22).

Jurisdiction

The judgment of the Court of Appeals was entered on April 11, 1975 (E-1). A timely petition by the Piper individuals for rehearing and rehearing *en banc* was denied on June 9, 1975 (E-5, E-7). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether under Section 14(e) of the Securities Exchange Act of 1934 a tender offeror is entitled to $36 million in damages from management of the target corporation for alleged misrepresentations in letters to shareholders recommending against accepting the tender offer in the absence of proof of a causal connection, which connection was replaced by the irrebuttable presumptions (a) that shareholders relied on the misrepresentations and hence did not tender; (b) that as a result the offeror acquired fewer shares on its tender offer, although more than it had offered to purchase; and (c) that this caused injury to the offeror seven months later when another corporation acquired majority control of the target corporation?

2. Whether management of the target corporation may be held jointly and severally liable with another corporation which, seven months after management's alleged violations of Section 14(e), achieved control of the target corporation through its own unrelated and independent violations of the securities laws of which management had no prior knowledge, and in which they did not participate?

3. Whether under Section 28(a) of the Securities Exchange Act of 1934 Respondent is entitled to a $36 million judgment without proof of the actual damages it suffered on account of the acts complained of thereby placing the entire burden of intervening market losses on the Petitioners without affording them an opportunity to adduce proof on the matter?

Statutes Involved

Sections 14(e) and 28(a) of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. §§ 78n(e) and 78bb(a), respectively, are set forth in the Addendum to this petition.

Statement of the Case

Petitioners seek review of the decisions of the Court of Appeals twice reversing the District Court after trial and increasing the damages awarded to Respondent Chris-Craft Industries, Inc. ("Chris-Craft") from $1,673,988 plus $599,010.89 pre-judgment interest to $25,793,365 plus over $10,000,000 pre-judgment interest.

The Piper individuals were officers and directors of Piper Aircraft Corporation in January 1969 when Chris-Craft made a tender offer for up to 300,000 shares of Piper Aircraft at $65 per share (A-10). With the advice of outside consultants, the Board of Directors of Piper Aircraft decided to oppose Chris-Craft's tender offer as inadequate and not in the best interests of all shareholders (A-11).

The Board also attempted to find a better alternative than Chris-Craft. These opinions and actions of the Board were communicated to Piper Aircraft's shareholders (A-11). Use of the word "inadequate" and the description of the alternative were subsequently found by the Court of Appeals to be misrepresentations (A-38, A-39). Despite the alleged misrepresentations, at the close of the tender offer Chris-Craft still acquired more shares than it had offered to purchase (A-113).

In May 1969, three months later, Bangor Punta Corporation began purchasing Piper Aircraft shares, paying over $70 and as much as $80 per share (A-16, B-26). By September 1969 it had acquired over 800,000 Piper Aircraft shares, enough to give it control (A-18). Of those shares, about 200,000 were held to have been acquired by Bangor Punta in violation of the securities laws, and held to have denied Chris-Craft a fair opportunity to compete for control (A-60, A-66). The Piper individuals did not participate in or have any knowledge of those violations. Nevertheless, the Court of Appeals held the Piper individuals jointly and severally liable with Bangor Punta for $36 million in damages.

a. Factual Background

This action was filed by Chris-Craft on May 22, 1969 against Piper Aircraft and the Piper individuals, Bangor Punta and certain of its officers and The First Boston Corporation and two of its officers. It stems from purchases of shares of common stock of Piper Aircraft that Chris-Craft began making in December 1968 (A-9). On January 23, 1969 Chris-Craft, which would have needed more than 500,000 additional Piper Aircraft shares to obtain control, announced a cash tender offer for up to only 300,000 shares at $65 per share (A-10).*

* At the time the stock was selling for $52.50 per share on the New York Stock Exchange (A-10).

The tender offer remained open only 11 days, until February 3, 1969 (A-10). Chris-Craft had made no arrangements for the financing it would require were it to purchase more than 300,000 shares (B-61).

Upon receiving notice of Chris-Craft's tender offer, the management of Piper Aircraft immediately sought advice concerning Chris-Craft from its investment advisor, First Boston, its counsel and its auditors (A-10). Thereafter, in light of the information obtained, the Board of Directors of Piper Aircraft—consisting of the three Piper individuals and five other members—considered the tender offer and adopted a resolution opposing it (A-11). The substance of the resolution—that the offer was inadequate and not in the best interests of Piper Aircraft's shareholders—was communicated to Piper Aircraft shareholders by letters dated January 27 and 28, 1969. The letters were signed by W. T. Piper, Jr., president of Piper Aircraft at the time and one of the Petitioners herein (A-11).

Piper Aircraft at the same time sought out other companies in an effort to find a better alternative than Chris-Craft. Among the companies contacted was Grumman Aircraft Engineering Corporation. After negotiations Piper Aircraft agreed to sell Grumman 300,000 authorized but unissued shares of stock of Piper Aircraft at $65 per share—the Chris-Craft tender offer price (A-11). This agreement was announced to shareholders on January 29, while Chris-Craft's tender offer was still open (A-12). The result of the announcement was to make Chris-Craft's tender offer more attractive since the market price of Piper Aircraft shares declined from $64¼ per share on January 28 to $59⅝ on February 3, when Chris-Craft's tender offer closed (A-114, n. 3).*

* Since more shares would have been outstanding, of course, the $65 price to Grumman actually reflected a higher value per share than the $65 offered by Chris-Craft on its tender offer. Had the shares been issued, the previously outstanding shares would have been worth proportionately less.

One of the numerous terms in the agreement, which was not specifically referred to in the announcement, was that the agreement could be terminated if merger negotiations proved unfruitful and Piper Aircraft would either find another buyer for the shares or return the purchase price to Grumman plus nominal interest (A-11). This provision was referred to by the courts below as an option to Grumman to "put" the shares back to Piper Aircraft (A-11, A-129, n. 2).*

At the close of Chris-Craft's tender offer it received 304,606 shares of Piper Aircraft stock—more than the 300,000 shares it sought. It purchased them all, giving it a total of 547,106 shares, or about 33% of the shares outstanding (A-12).

The January communications described above constituted the sole actions of the Piper individuals for which the Court of Appeals held them jointly and severally liable to pay damages to Chris-Craft of more than $36,000,000!

The Piper individuals were held liable because Bangor Punta, which began purchasing Piper Aircraft shares in May 1969, had by September 1969 acquired more than 50% of the outstanding shares (A-18). In so doing, it frustrated Chris-Craft's decision—reached in mid-February 1969 after the events just described (B-61)—to acquire over 50% of the shares itself.

About 120,000 shares of the stock acquired by Bangor Punta in May 1969 were found to have been acquired in violation of Rule 10b-6 under the 1934 Act, 17 C.F.R. § 240.10b-6 (A-64), and another 111,000 shares (a combined total of about 14% of the outstanding shares) were found to have been acquired by Bangor Punta in July 1969 in violation of Section 14(e) of the 1934 Act (A-48). The

* For reasons not material here, the shares were never issued and the agreement was terminated by mutual consent on March 19, 1969 (A-12).

Court of Appeals held that, since Chris-Craft acquired about 42% while Bangor Punta acquired about 51% of the stock, the 14% found to have been illegally acquired by Bangor Punta provided sufficient basis for liability (A-60, A-67).

The Piper individuals did not have knowledge of, or participate in, either of the Bangor Punta violations. Nevertheless, considering Bangor Punta's "narrow margin of victory" (A-63) they were held jointly and severally subject to a crippling judgment amounting to over $36 million because their alleged violations of Section 14(e) "contributed to the success" of Bangor Punta's "takeover attempt" (A-69).

The violations of Section 14(e) found by the Court of Appeals were calling the tender offer "inadequate" and not describing the "put" in the January communications. The Court of Appeals, reversing the trial court, held these were material misrepresentations (A-38-39). Inferring that the shareholders relied on the misrepresentations, the Court of Appeals then held this presumably denied Chris-Craft "the opportunity to purchase additional shares" on its tender offer and, since Bangor Punta eventually acquired control, the Court of Appeals assumed that Chris-Craft was denied "a fair opportunity to win the contest for control" (A-62-63). Chris-Craft, however, always maintained that in making its purchases pursuant to its tender offer it was not committing itself to obtaining control of Piper Aircraft (B-61).*

b. Proceedings Below

The action was tried in March 1971 concurrently with two related cases brought by Bangor Punta against Chris-Craft and by the SEC against Bangor Punta.** After

* For example, it stated in its Schedule 13D filed concurrently with its tender offer pursuant to the Williams Act, 15 U.S.C. § 78n(d-f), that it did not have any specific plan or proposal to acquire control of Piper Aircraft and that the purchases were made only with a "view" towards control (B-61).

** The Piper individuals were not parties to either of the other two cases.

trial the District Court dismissed Chris-Craft's complaint against all defendants in December 1971 (A-125). The Court of Appeals reversed in April 1973 (A-1) and remanded the case with explicit directions to hold all defendants, except Piper Aircraft, jointly and severally liable and to award damages and injunctive relief to Chris-Craft (A-69).

The Court of Appeals reversal as to the Piper individuals was based upon its own determination that calling the offer "inadequate" and not describing the resale provision in the January communications violated Section 14(e).

In the District Court Chris-Craft claimed that the letters of January 27 and 28, which conveyed the opinion of the Piper Aircraft Board of Directors that the Chris-Craft tender offer was "inadequate and not in the best interests" of Piper Aircraft shareholders, were materially misleading. The District Court rejected the claim and concluded (i) that the word "inadequate" referred to the entire limited tender offer and not just to the price and (ii) even assuming "inadequate" referred to price, the statement "would be more fatuous than misleading" because any "shareholder with a telephone or newspaper at hand could compare the current market for Piper [Aircraft] shares with Chris-Craft's offer" (A-135). The Court of Appeals disagreed with the trial court and held that the word "inadequate" referred to price and not the entire offer. It then found use of the word "inadequate" materially misleading because the tender offer price of $65 per share was considerably higher than the current market price of $52 per share and First Boston had told Piper Aircraft that the price itself was fair although it agreed that the offer was inadequate (A-37-38).

The Court of Appeals also held the Piper individuals liable for not disclosing the Grumman "put" in the announcement of January 29. Although it concurred with the District Court's finding that the agreement with Grumman

was not a sham and that the resale provision was a rational and logical part of the agreement, it disagreed with the District Court's finding that the omission did not injure Chris-Craft (A-39).

The trial court had rejected as "unfounded" Chris-Craft's contention that the January communications caused it injury since Chris-Craft was not seeking more than 300,000 shares on its tender offer and "did not have sufficient funds to purchase any significant amount in excess of 300,000" (A-113). A majority of the Court of Appeals held, however, that it was a "reasonable presumption that [Chris-Craft] was unlawfully denied the opportunity to purchase additional shares" (A-62). The dissenting judge agreed with the trial judge that Chris-Craft failed to show any injury because it "got more shares than it agreed to buy" (A-113).

The defendants petitioned this Court for writs of certiorari, which were denied in October 1973.* Thereafter, in March 1974 the District Court conducted the trial on remand pursuant to the Court of Appeals mandate to award damages based upon "the reduction in the appraisal value of [Chris-Craft's] Piper holdings attributable to [Bangor Punta's] taking a majority position and reducing [Chris-Craft] to a minority position, and thus being able to compel a merger at any time" (A-69).

Since the Court of Appeals agreed with the District Court that Chris-Craft had failed to prove that it would have obtained a majority of the shares of Piper Aircraft absent the violations found, what Chris-Craft lost, it held, was the opportunity to compete for control (A-56, A-60, A-66). The trial court, on remand, attempted to place a value on that lost opportunity. It found that actual majority control was worth between 5% and 10% of the fair market value of Piper Aircraft stock and that the "*oppor-*

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* 414 U.S. 910. Nos. 73-152, 73-153 and 73-154.

tunity (speculative at best) of gaining a majority" of the shares "is generously valued at 5% above fair market value of the stock" (B-70, emphasis the Court's). Accordingly, the trial judge awarded Chris-Craft damages of $1,673,988 calculated as of the date Bangor Punta acquired control (B-70). The trial court denied Chris-Craft's claim for consequential damages, but in its discretion awarded Chris-Craft pre-judgment interest (B-79) for a total judgment of over $2.2 million.*

Chris-Craft appealed from the judgment, claiming it was insufficient, while defendants cross-appealed claiming both that the judgment was excessive and that the 1973 decision of the Court of Appeals was erroneous.

The Court of Appeals in April 1975 reversed the damage award and directed entry of a modified judgment of $25,793,365 plus pre-judgment interest, which at present would amount to over $10 million, for a total judgment of about $36 million. It awarded these astronomical damages by abandoning its mandate that the trial court evaluate the loss of the opportunity to compete for control and declared instead, for the first time, that Chris-Craft be awarded damages measured by the difference between what Chris-Craft paid for all the Piper Aircraft shares it owned on September 5, 1969 and the hypothetical price that Chris-Craft could have obtained had it sold the shares in January 1970 (B-28-30).

Reasons for Granting the Writ

The Court of Appeals observed that this case presents "important questions, some of first impression, involving the antifraud provisions of the federal securities laws in their application to a contest for acquisition of a control-

* In addition, pursuant to the remand, the District Court entered an injunction against Bangor Punta (B-71 *et seq.*), the provisions of which this Petition does not contest.

ling stock interest in a target corporation" (A-6). It has set a precedent for determining "the scope of liability and relief under Section 14(e)" (A-6) which is contrary to decisions in other circuits and to the decisions of this Court.

I. The Court of Appeals determinations on causation, liability and relief conflict with decisions of other Courts of Appeals and have since been rejected by this Court's decisions in *Blue Chip Stamps* v. *Manor Drug Stores* and *Rondeau* v. *Mosinee Paper Corp.*

The effect of the Court of Appeals decision is to dispense entirely with the traditional requirement of proof of a causal connection between the Piper individuals' alleged misrepresentations in January and Chris-Craft's alleged injury when it lost the opportunity to gain control in September. The trial court had held that Chris-Craft's claims concerning the January communications were unfounded (A-138) and that it failed to establish any causal connection between the alleged violations and its claimed injury (A-147).

The Court of Appeals reversed, observing that one of "the fundamental issues upon which we disagree with the district court is that of causation" (A-55). It held that although the January communications were directed to the Piper Aircraft shareholders and not to Chris-Craft, nevertheless, since they contained misrepresentations, the shareholders presumably relied upon them and did not tender to Chris-Craft (A-62). Therefore, the Court of Appeals held, "it is a reasonable presumption that [Chris-Craft] was unlawfully denied the opportunity to purchase additional shares" (A-62). Based upon that presumption, and "considering the narrow margin of victory" by which Bangor Punta acquired control in September (A-63), the Court of Appeals then speculated that calling the offer "inadequate" in January denied Chris-Craft "a fair opportunity to win the contest for control" in September and presumed that as a result, Chris-Craft was injured (A-63).

Thus, by a series of presumptions the Court of Appeals majority dispensed with the need for Chris-Craft to prove that it was injured by the alleged violations in January and thereby permitted a completely conjectural and speculative recovery—it was on this very issue that one judge dissented (A-116). The Court of Appeals' position is in direct conflict with this Court and the Courts of Appeal for the First, Third, Fourth, Fifth, Seventh and Tenth Circuits.

The result reached in the Second Circuit exemplifies the propriety of the concern expressed by this Court in *Blue Chip Stamps* v. *Manor Drug Stores*, —— U.S. ——, 95 S.Ct. 1917 (1975), decided on the same day rehearing was denied by the Court of Appeals. That concern is that when the courts grant standing to sue to a plaintiff who claims an "intangible economic injury such as loss of a noncontractual opportunity" to purchase shares, plaintiff will seek —and here has been granted—a large "conjectural and speculative recovery in which the number of shares involved will depend on the plaintiff's subjective hypothesis." (95 S.Ct. at 1925). Here, neither Chris-Craft nor the Court of Appeals made any effort to determine the number of shares not tendered to Chris-Craft. Its ultimate defeat by Bangor Punta seven months later was the sole basis for awarding Chris-Craft over $36 million in damages assessed against three individuals for calling a tender offer "inadequate."*

Furthermore, by presuming that Piper Aircraft shareholders did not tender to Chris-Craft because of the alleged misrepresentations in the January communications, the Court of Appeals rejected the obvious alternatives noted by this Court in *Blue Chip*—shareholders did not tender for reasons unrelated to the misrepresentations. "Ownership of stock or receipt of a prospectus says little about

* That the offer was inadequate was confirmed by the fact that later offers to shareholders were for as much as $80 per share (A-16).

whether a plaintiff's investment decision was affected by a violation of Rule 10b-5 or whether a decision was even made" (95 S.Ct. at 1930, n. 10). Nevertheless, the Court of Appeals made the presumption on appeal and in so doing denied the Piper individuals even the opportunity to offer any proof that shareholders did not tender in anticipation of receiving more for their shares later.

This is in direct conflict with the Third and Fourth Circuits which, although inferring reliance from a material non-disclosure nevertheless permit the defendant to offer proof that the non-disclosure did not cause the plaintiff's loss. *Rochez Bros., Inc.* v. *Rhoades*, 491 F.2d 402, 410 (3 Cir. 1974); *Carras* v. *Burns*, 516 F.2d 251, 257 (4 Cir. 1975).

The result reached by the court below also is in direct conflict with *Rondeau* v. *Mosinee Paper Corp.*, —— U.S. ——, 95 S.Ct. 2069 (1975), decided after rehearing was denied below. In *Rondeau* this Court made it clear that the Williams Act, which added Section 14(e) to the 1934 Act, still requires plaintiff to establish the traditional prerequisites of relief (95 S.Ct. at 2078). One of those traditional prerequisites is that a defendant only "is liable to respond in such damages as naturally and proximately result from the fraud." *Estate Counseling Service, Inc.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 303 F.2d 527, 533 (10 Cir. 1962). See also *Clegg* v. *Conk*, 507 F.2d 1351, 1361 (10 Cir. 1974).

Furthermore, in *Rondeau* this Court reaffirmed the principle of *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389 (1970), that "damages should be recoverable only to the extent that they can be shown" and re-emphasized that the relief to which plaintiff is entitled "is to be determined according to traditional principles" (95 S.Ct. at 2079). Other circuits have uniformly required the traditional proof of causation before awarding damages.

The Fifth Circuit holds that plaintiff must prove some causal connection between the alleged violation and the

plaintiff's injury. *Sargent* v. *Genesco, Inc.*, 492 F.2d 750, 761 (5 Cir. 1974).* The question is "did the injury to the plaintiff flow directly and proximately from the actions of this particular defendant." *Hill York Corporation* v. *American International Franchises, Inc.*, 448 F.2d 680, 693 (5 Cir. 1971).

The First Circuit has also expressed its "agreement that proof of proximate cause was an indispensable part of plaintiff's burden" *Landry* v. *Hemphill, Noyes & Co.*, 473 F.2d 365, 370 (1 Cir. 1973), cert. denied 414 U.S. 1002.

The Seventh Circuit similarly holds that before monetary damages may be recovered there must be proof (not conjecture) that the violation caused the pecuniary loss. *Dasho* v. *Susquehanna Corp.*, 461 F.2d 11, 30 (7 Cir. 1972), cert. denied 408 U.S. 925; *Swanson* v. *American Consumers Industries, Inc.*, 475 F.2d 516, 519 (7 Cir. 1973). The violation must be the direct cause of the injury. Thus, no liability attaches to a false proxy statement when a fair and complete proxy statement is issued subsequently; the later "proxy statement broke the chain of causation between the earlier proxy statement and any damage allegedly caused by it." *Schy* v. *Susquehanna Corporation*, 419 F.2d 1112, 1117 (7 Cir. 1970), cert. denied 400 U.S. 826.

The Court of Appeals in this case, however, dispensed with any proof that calling the tender offer "inadequate" and not describing the "put" caused Chris-Craft injury. It speculated that calling the offer "inadequate" in January contributed to Chris-Craft's defeat in September and directed that Chris-Craft be awarded a judgment in excess of $36 million.

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* Indeed, the Fifth Circuit holds that Section 14(e) grants standing only to those security holders to whom the tender offer is addressed and not to some other party. "No violation of 14(e) could be shown where the class sought to be protected has not been harmed" (492 F.2d at 769). Here, the Piper Aircraft shareholders who did not tender to Chris-Craft were not harmed because they received more for their shares later.

By allowing Chris-Craft to sue for damages and then dispensing with the traditional requirement of proof of causation, the Second Circuit exposes individual members of management who in good faith oppose a tender offer to "a liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Ultramares Corp.* v. *Touche*, 255 N.Y. 170, 179, 174 N.E. 441, 444 (1931). The propriety of extending such liability is an issue properly for this Court. Moreover, by affording relief without proof of causation, the Second Circuit has placed itself in sharp conflict with other Courts of Appeals. Therefore, Petitioners request that this Court grant a writ of certiorari to resolve this conflict of decisions and to correct the erroneous holding of the Court of Appeals.

II. The decision below conflicts with traditional principles applied in other circuits for the imposition of joint and several liability.

In directing joint and several liability the Second Circuit not only abandoned the requirement of proof of causation, but in so doing it of necessity disregarded the principle of superseding cause. Other circuit courts have held that a wrongdoer is not liable when the damage for which a plaintiff is to be compensated results from an independent, intervening agency, which was not reasonably foreseeable. Here the Second Circuit has held the Piper individuals jointly and severally liable to Chris-Craft because of alleged misleading statements in January (A-62-63). The judgment of $36 million, however, is not intended to compensate Chris-Craft for what happened in January but, rather for the "reduction in the value of [Chris-Craft's] Piper holdings upon [Bangor Punta] unfairly obtaining control" (B-10) in September.

Although the Piper individuals did not participate in or have knowledge of the alleged violations by Bangor Punta in May and July 1969, that fact is ignored. The Court of Appeals majority simply declared that the violations by

the Piper individuals "contributed to the success of [Bangor Punta's] takeover attempt" and, therefore, they are jointly and severally liable (A-69).

The alleged violations by the Piper individuals in January 1969, however, were presumed merely to have denied Chris-Craft the opportunity to purchase additional shares on its tender offer. Chris-Craft could have and did purchase additional shares thereafter (A-137). Nevertheless, Chris-Craft is to be compensated for the reduction in value of all shares it purchased. Assuming a reduction occurred at all, it did not come about until September 1969 when Bangor Punta acquired over 50% of the Piper Aircraft shares (A-60). Indeed, the Court of Appeals observed that had Chris-Craft won its control battle with Bangor Punta it would not have sustained such damages (A-61). Clearly, the Piper individuals were not responsible for that injury.

Other circuit courts have recognized the common law doctrine of superseding or intervening cause in tort cases.* That doctrine relieves the first tortfeasor of liability because his conduct, although wrongful, was not the cause of plaintiff's injury.**

Not only did the Second Circuit ignore the effect upon Chris-Craft of Bangor Punta's subsequent and superseding violations, but it also failed to consider the principle that independent joint tortfeasors cannot be held jointly and severally liable when their acts cause distinct and separable injuries. "Damages for harm are to be apportioned among two or more causes where (a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm."* Restatement, Second, Torts § 433A. If the Piper individuals are to be held liable at all, the presumed consequence of their actions in January is distinct and separable from the presumed effect of Bangor Punta's acquisition of control seven months later.

By refusing to consider either the principle of superseding cause or the apportionment of damages, the Court of Appeals was able to hold that Chris-Craft is to be compensated by all defendants for the decline in value of its Piper Aircraft holdings occurring when Bangor Punta acquired control. The only basis for imposing joint and several liability on the Piper individuals is that they "contributed" to Bangor Punta's success (A-69). Hence their liability can only stand if they are aiders and abettors. No such determination was made with respect to them. The result reached thus conflicts with other circuit court decisions.

When joint and several liability for aiding and abetting a violation of the securities laws is imposed, there must be proof of the following three elements: "(1) that an independent wrong exists; (2) that the aider or abettor knew

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* That a violation of the securities laws is tortious in nature is well settled, see, *e.g.*, *Myzel* v. *Fields*, 386 F.2d 718, 744, n. 22 (8 Cir. 1967), cert. denied 390 U.S. 951 (1968); *Crist* v. *United Underwriters, Ltd.*, 343 F.2d 902, 904 (10 Cir. 1965). In determining liability in securities act cases, traditional common law principles apply. *Rondeau* v. *Mosinee Paper Corp.*, —— U.S. ——, 95 S.Ct. 2069, 2078 (1975).

** *E.g. Schreffler* v. *Birdsboro Corp.*, 490 F.2d 1148, 1154 (3 Cir. 1974); *Black* v. *United States*, 441 F.2d 741, 745-6 (5 Cir. 1971), cert. denied 404 U.S. 913; *Michael* v. *United States*, 338 F.2d 219, 220 (6 Cir. 1964); *Leistra* v. *Bucyrus-Erie Company*, 443 F.2d 157, 162-3 (8 Cir. 1971); *United States ex rel. Standard Oil Co. of California* v. *Natt McDougall Company*, 381 F.2d 686, 689 (9 Cir. 1967); *Texas Metal Fabricating Company* v. *Northern Gas Products Corp.*, 404 F.2d 921, 925 (10 Cir. 1968).

* This principle has been followed by other Courts of Appeals which have held several tortfeasors jointly and severally liable. *Borel* v. *Fibreboard Paper Products Corporation*, 493 F.2d 1076, 1094-5 (5 Cir. 1973), cert. denied 419 U.S. 869 (1974); *Michie* v. *Great Lakes Steel Division, National Steel Corp.*, 495 F.2d 213, 217 (6 Cir. 1974), cert. denied 419 U.S. 997. The Second Circuit itself has upheld the apportionment of damages for separable injuries in a later decision. *Modave* v. *Long Island Jewish Medical Center*, 501 F.2d 1065, 1073 (2 Cir. 1974). Here, however, having ignored the matter on appeal, the Second Circuit did not even give the Piper individuals an opportunity to adduce proof on the issue of apportionment.

of that wrong's existence; and (3) that substantial assistance be given in effecting that wrong." *Landy* v. *Federal Deposit Insurance Corporation,* 486 F.2d 139, 162-3 (3 Cir. 1973).

The Second Circuit found an independent wrong by Bangor Punta, but it nowhere found, nor did Chris-Craft ever claim, that the Piper individuals knew, or should have known, of that wrong's existence or that they gave substantial (or any) assistance to Bangor Punta in effecting it. The imposition of joint and several liability in the absence of such facts places the Second Circuit in direct conflict with the Third, Sixth, Seventh, Ninth and Tenth Circuits.* See e.g., *Landy* v. *Federal Deposit Insurance Corporation, supra,* 486 F.2d at 163-4; *SEC* v. *Coffey,* 493 F.2d 1304, 1316-17 (6 Cir. 1974); *Brennan* v. *Midwestern United Life Insurance Co.,* 417 F.2d 147, 154 (7 Cir. 1969), cert. denied 397 U.S. 989; *Northway Inc.* v. *TSC Industries, Inc.,* 512 F.2d 324, 339-40 (7 Cir. 1975); *Wessel* v. *Buhler,* 437 F.2d 279, 283 (9 Cir. 1971); *Strong* v. *France,* 474 F.2d 747, 752 (9 Cir. 1973); *Kerbs* v. *Fall River Industries, Inc.,* 502 F.2d 731, 740 (10 Cir. 1974).

By applying improper standards for the imposition of joint and several liability against three individual members of management, the Second Circuit has drastically penalized management in contested tender offers. "[I]n contests for control the management has a role to play as such and not merely insofar as the managers are stockholders." *Studebaker Corp.* v. *Gittlin,* 360 F.2d 692, 695 (2 Cir. 1966). The propriety of curtailing that role and extending joint and several liability to parties who have not participated in, or have any knowledge of, wrongful conduct by another is sufficient reason to warrant the issuance of a writ of certiorari to review and correct the decision of the Court of Appeals.

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* The decision even conflicts with the Second Circuit's own decision in *Lanza* v. *Drexel & Co.,* 479 F.2d 1277, 1302-3 (2 Cir. 1973), decided after the panel's reversal on the liability issue.

III. The fifteenfold increase in the damage award by the Court of Appeals conflicts with § 28(a) of the 1934 Act, decisions in the Eighth, Ninth and Tenth Circuits and constitutes a gross miscarriage of justice.

Although the Piper individuals' liability was based on calling the tender offer "inadequate" and not describing the "put" in January 1969, the Court of Appeals nevertheless awarded $36 million in damages to Chris-Craft calculated upon a hypothetical sale in January 1970, a year later. The trial court found, and the Court of Appeals agreed, that September 5, 1969 was the proper date for valuing Chris-Craft's injury (B-13, n. 10). That was when Bangor Punta acquired over 50% of the Piper Aircraft shares. Until Bangor Punta acquired those shares Chris-Craft still had the opportunity to purchase control for itself. If Chris-Craft was injured at all, it was then.

Under these circumstances the Court of Appeals in its liability decision set forth a precise formula for measuring Chris-Craft's damages (A-69):

> "The measure of damages should be the reduction in the appraisal value of [Chris-Craft's] Piper holdings attributable to [Bangor Punta's] taking a majority position and reducing [Chris-Craft] to a minority position, and thus being able to compel a merger at any time."

Heeding that mandate, the District Court on remand attempted to value the reduction as of September 5, 1969. That value, the District Court held, was 5% of the fair market value of Piper Aircraft shares, or $2.40 per share (B-70). Multiplied by the total number of shares Chris-Craft owned at that time the damages were $1,673,988; with pre-judgment interest the total judgment was $2,272,998.89 (B-11-12).

The Court of Appeals reversed and directed entry of judgment for $25,793,365 plus pre-judgment interest (B-3) for a total of about $36 million. The modified damage award was not predicated on the reduction in value attributable to Bangor Punta gaining control as the mandate required, but rather on the difference between Chris-Craft's average cost per share and $27, the hypothetical price per share Chris-Craft might have received had it sold its shares, not in September 1969 but in January 1970 (B-29-30).

By discarding the original formula for calculating damages and using Chris-Craft's cost, the Court of Appeals increased Chris-Craft's award by about $16 per share. By using a January 1970 date rather than September 1969 the Court further increased Chris-Craft's award by about $15 per share. The defendants have not had the opportunity to offer proof on either of these points, which only became relevant issues after the Court of Appeals changed its mandate.

By using costs and a hypothetical sale price of $27 per share, the Court of Appeals damage award includes the full premium over the market price that Chris-Craft paid before any violations occurred.* It also includes all intervening market losses between December 1968 when Chris-Craft purchased its first shares and January 1970. These losses are completely unrelated to the violations found. The Court of Appeals acknowledged this by stating that what it was doing was "shifting the entire burden of [Chris-Craft's] loss to defendants" (B-27). To compound the injustice Chris-Craft, which claims to have spent $44 million to acquire its shares (A-18), will (a) receive $36 million as alleged compensatory damages, (b)

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* Chris-Craft acquired over 200,000 shares of stock before announcing its tender offer. All of the shares were purchased for over $50 per share, with 101,000 of them purchased for $65 per share the day before Chris-Craft made its tender offer (A-9-10).

retain its shares and (c) be the beneficiary of a five-year injunction against Bangor Punta voting over 200,000 of its shares.

Thus, far from being compensatory the damages are punitive and in direct contravention of § 28(a) of the 1934 Act. That statute requires that only "actual damages on account of the act complained of" be awarded. The decision also conflicts with the holdings of other circuits that only actual and not punitive damages may be awarded for violations of the securities laws, e.g. *Richardson* v. *MacArthur,* 451 F.2d 35, 43 (10 Cir. 1971); *Myzel* v. *Fields,* 386 F.2d 718, 748 (8 Cir. 1967), cert. denied 390 U.S. 951 (1968); and with other panels of the Second Circuit itself, *Green* v. *Wolf Corporation,* 406 F.2d 291, 303 (2 Cir. 1968), cert. denied sub. nom. *Trosta, Singer and Co.* v. *Green,* 395 U.S. 977; *Globus* v. *Law Research Service, Inc.,* 418 F.2d 1276, 1286 (2 Cir. 1969), cert. denied 397 U.S. 913 (1970).

Moreover, the decision also conflicts with decisions in the Eighth, Ninth and Tenth Circuits which prohibit plaintiffs from recovering damages resulting from independent market forces rather than the alleged securities act violation. Thus, when a purchaser of stock is defrauded in connection with his purchase, he is entitled to collect damages measured as of the date of discovery of the fraud. Any subsequent decrease in market price cannot be used to increase his damage award and, conversely, any subsequent increase in market price cannot be used to reduce his damage award. "This is the only method in which a consistent measure of damages can be obtained." *Harris* v. *American Investment Company,* Cur. Vol. CCH Fed. Sec. L. Rep., ¶ 95,208, at p. 98,054 (8 Cir. 1975).

Similarly, in *Foster* v. *Financial Technology, Inc.,* [1974-1975 Transfer Binder] CCH Fed. Sec. L. Rep., ¶ 95,103, at p. 97,913 (9 Cir. 1975), the Ninth Circuit held that "damages are limited by what [plaintiffs] would have realized

if they had acted upon their claim when they first learned of the fraud or had reason to know of it." See also, *Esplin* v. *Hirschi,* 402 F.2d 94, 104-5 (10 Cir. 1968), cert. denied 394 U.S. 928 (1969); *Richardson* v. *MacArthur,* 451 F.2d 35, 44 (10 Cir. 1971).

The result of the decision of the Second Circuit, however, is that a violaton of Section 14(e) by management during a tender offer makes management an insurer of the raider's otherwise normal market risks. It extends their liability past the dates when the raider (a) discovers the violation; (b) brings suit therefor; and (c) loses the battle for control. If the raider fails, management must reimburse it for the full premium paid over the market price plus all intervening market declines. These amounts cannot be determined, or even mitigated or avoided, until the control contest ends, the victor emerges and the loser either sells his shares or the court finds a hypothetical sale date some time later. In short, the Second Circuit has given Chris-Craft both the benefit of a series of irrebuttable presumptions which eliminated proof of "actual damages on account of the act complained of" and a guarantee against market losses.

Finally, by determining factual issues for the first time on appeal, the Second Circuit has effectively denied the Piper individuals their day in court. Had the factual issues on damages decided at the appellate level been the subject of proof at the trial level, the Piper individuals could have shown: (1) the value to Chris-Craft in January 1969 of an opportunity to purchase additional shares on its tender offer, and (2) when Chris-Craft could have disposed of its shares after January 1969 and the amount it could have received on such disposition. Those issues were never litigated in the trial court and were never briefed in the Court of Appeals. They were decided by the Court of Appeals without a remand and without the taking of any evidence.

For these reasons alone we respectfully urge this Court grant a writ of certiorari to review and correct the decision of the Court of Appeals.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL G. PENNOYER, JR.
ZACHARY SHIMER
30 Rockefeller Plaza
New York, New York 10020
Counsel for Petitioners

CHADBOURNE, PARKE, WHITESIDE
& WOLFF
Of Counsel

September 5, 1975

ADDENDUM

Section 14(e), Securities Exchange Act of 1934, 15 U.S.C. § 78n(e)

"(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation."

By P.L. 91-567 adopted December 22, 1970, after the events complained of in this action, Congress added the following sentence:

"The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative."

Section 28(a), Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a)

"(a) The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."

Certificate of Service

I hereby certify that three copies of the foregoing Petition for a Writ of Certiorari were served by hand this 5th day of September on Arthur L. Liman, Esq., 345 Park Avenue, New York, New York 10022, counsel for Respondent. I further certify that all parties required to be served have been served.

Dated: September 5, 1975

ZACHARY SHIMER
30 Rockefeller Plaza
New York, New York 10020
Counsel for Petitioners

APPENDIX

Supreme Court of the United States

October Term, 1975

No. 75-353
No. 75-354
No. 75-355

HOWARD PIPER, THOMAS F. PIPER AND WILLIAM T. PIPER, JR.,
Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,
Respondent.

THE FIRST BOSTON CORPORATION,
Petitioner,

v.

CHRIS-CRAFT INDUSTRIES, INC.,
Respondent.

BANGOR PUNTA CORPORATION, NICOLAS M. SALGO AND DAVID W. WALLACE,
Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONS FOR CERTIORARI FILED SEPTEMBER 5, 1975
CERTIORARI GRANTED APRIL 5, 1976

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Relevant Docket Entries

United States District Court for the Southern District of New York

May 22, 1969—Filed complaint and issued summons.

July 23, 1969—Filed memorandum in support of Chris-Craft's motion for a pre. inj.

August 19, 1969—Filed Opinion #36107. Tenney, J. • • • For the foregoing reasons, plaintiff's motion is in all respects denied. So ordered (mailed notice).

September 4, 1969—Filed Notice of Appeal by Chris-Craft Industries, Inc. (mailed copy).

June 16, 1970—Filed true copy of order from the USCA: Order of District Court is affirmed and that the action be and it hereby is remanded to said District Court for further proceedings not inconsistent with the opinion of this court with costs to be taxed against the appellant. Clerk

June 22, 1970—Filed pltff's second amended complaint.

February 6, 1971—Trial Begun: Before Pollack, J.—Non-Jury Trial. Adjourned Sine Die.

March 9, 1971—Trial continued.

March 19, 1971—Trial continued and concluded—Defts' Bangor Punta, N. Salgo and D. Wallace rest and renew the motions made previously to dismiss the complaint—Decision Reserved. Defts First Boston, P. Miller and N. Bayard rest and renew motion to dismiss—Decision Reserved. Ptff. Chris-Craft moves to dismiss the counterclaim of Piper Aircraft—Decision Reserved. Pollack, J.

December 10, 1971—Filed Opinion #38096. The counterclaim of Piper against Chris-Craft is dismissed for failure to sustain the burden of proof thereof. The foregoing shall constitute the findings and conclusions required by F.R. Civ. P. 52(a). So ordered. Pollack, Jr. Judg, Ent. Clerk Ent. 12-1.

December 14, 1971—Filed plaintiff's notice of appeal to U.S.C.A.—Mailed copies.

June 15, 1973—Filed True Copy of Mandate from U.S.C.A. with copy of opinion. Ordered that judgment of District Court is reversed and that the action be and it is remanded to the District Court for further proceedings in accordance with the opinion of this Court with costs to be taxed against the appellee. No bill of costs or statement attached. Mansfield, Timbers and Gurfein, J. (to all attorneys).

April 22, 1974—Non-jury trial begun before Judge Pollack.

April 25, 1974—Trial continued and concluded. Decision reserved, Pollack J.

November 22, 1974—Filed Final Judgment and Decree #74,903—Ordered, etc. that Chris-Craft shall recover of defendants, Howard Piper, Thomas F. Piper, T. Piper, Jr., Bangor Punta Corp., Nicholas M. Salgo, David M. Wallace and The First Boston Corp., jointly and severally, the sum of $1,673,988, plus interest in the amount of $599,010.89 with costs to be taxed by the Clerk, Pollack, J. Judgment entered 11/25/74. Clerk.

November 25, 1974—Filed Plaintiff's notice of appeal to the U.S.C.A. from final judgment entered on 11-22-74. Mailed copies to Webster, Sheffield, Fleischmann (Hitchcock & Brookfield—Chadbourne, Parke, Whiteside & Wolff—Sullivan & Cromwell.

United States Court of Appeals for the Second Circuit

September 19, 1969—Argument heard (by: Lumbard, Waterman, Kaufman, CJJ)

November 6, 1969—Judgment Affirmed and Action remanded, Waterman, CJ

January 12, 1970—Filed order granting petition for rehearing in banc

April 28, 1970—On Petition for Rehearing in banc—Order affirmed and Remanded, Waterman, CJ

August 14, 1972—Argument heard (by: Mansfield, Timbers, CJJ & Gurfein, D.J.) & in 72-1064, 72-1120, 72-1140)

March 16, 1973—Judgment Affirmed in Part; reversed and remanded in part, Timbers, CJ

April 25, 1973—Filed order denying petitions for rehearing (Piper, Bangor Punta & First Boston) and in 72-1064, 72-1120, 72-1140 but amending opinion

April 25, 1973—Filed order denying petition for rehearing in banc (Piper)

April 25, 1973—Filed order denying petition for rehearing in banc (Bangor Punta)

April 25, 1973—Filed order denying petition for rehearing in banc (First Boston)

May 8, 1973—Filed order denying petition for rehearing (S.E.C.) (& in 72-1064, 72-1120, 72-1140)

May 8, 1973—Filed order denying petition for rehearing in banc (S.E.C.) (& in 72-1064, 72-1120, 72-1140)

October 19, 1973—Filed certified copy of order of Supreme Court denying petition for writ of certiorari (First Boston Corporation)

October 19, 1973—Filed certified copy of order of Supreme Court denying petition for writ of certiorari (Bangor Punta Corporation, et al.)

October 19, 1973—Filed certified copy of order of Supreme Court denying petition for writ of certiorari (Howard Piper, et al.)

October 19, 1973—Filed certified copy of order of Supreme Court denying petition for writ of certiorari (S.E.C.) (& in 72-1064, 72-1120, 72-1140)

February 24, 1975—Argument heard (By: Mansfield, Oakes, Timbers, CJJ)

April 11, 1975—Judgment affirmed in part; reversed and vacated in part; and remanded with instructions, Timbers, CJ (& in 75-003)

May 15, 1975—Filed memorandum by S.E.C. in support of petition for rehearing of First Boston Corp.

May 15, 1975—Filed order granting leave to Securities Industry Association to file a brief *amicus curiae* in support of petition for rehearing or rehearing en banc of the First Boston Corp.; it is further ordered that the affidavit of Arthur L. Liman, Esq., sworn to April 28, 1975 also is ordered to be filed and distributed to the active judges of the Court

June 9, 1975—Filed order denying petition for rehearing (First Boston Corp.)

June 9, 1975—Filed order denying petition for rehearing en banc (First Boston Corp.)

June 9, 1975—Filed order denying petition for rehearing (Howard Piper)

June 9, 1975—Filed order denying petition for rehearing en banc (Howard Piper)

June 9, 1975—Filed order denying petition for rehearing (Bangor)

June 9, 1975—Filed order denying petition for rehearing en banc (Bangor)

April 14, 1976—Filed certified copy of order from Supreme Court granting writ of certiorari (Bangor Punta)

April 14, 1976—Filed certified copy of order from Supreme Court granting writ of certiorari (First Boston)

April 14, 1976—Filed certified copy of order from Supreme Court granting writ of certiorari (Piper)

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Court of Appeals Opinion on Liability

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 805-08—September Term, 1971.

(Argued August 14, 1972 Decided March 16, 1973.)

Docket Nos. 72-1053, 72-1064, 72-1120, 72-1140

DOCKET NO. 72-1064

CHRIS-CRAFT INDUSTRIES, INC.,

Plaintiff-Appellant,

v.

PIPER AIRCRAFT CORPORATION, HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICOLAS M. SALGO, DAVID W. WALLACE, THE FIRST BOSTON CORPORATION, PAUL L. MILLER and NICHOLAS H. BAYARD,

Defendants-Appellees.

DOCKET NO. 72-1120

BANGOR PUNTA CORPORATION,

Plaintiff-Appellant,

v.

CHRIS-CRAFT INDUSTRIES, INC.,

Defendant-Appellee.

DOCKET NOS. 72-1053 and 72-1140

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellant-Appellee,

v.

BANGOR PUNTA CORPORATION,

Defendant-Appellee-Appellant.

Before:

MANSFIELD and TIMBERS, *Circuit Judges,* and
GURFEIN, *District Judge.**

Appeals from judgments entered after non-jury trials of three separate but related civil actions in the Southern District of New York, Milton Pollack, *District Judge,* involving alleged violations of the antifraud provisions of the federal securities laws in connection with the contest between Chris-Craft Industries, Inc. and Bangor Punta Corporation for control of Piper Aircraft Corporation.

Affirmed in part; reversed and remanded in part.

ARTHUR L. LIMAN, New York, N.Y. (Stuart Robinowitz, Joseph J. Ackell, Jack C. Auspitz, Anthony M. Radice and Paul, Weiss, Rifkind, Wharton & Garrison, New York, N.Y., on the brief), *for Chris-Craft Industries, Inc. (Plaintiff-Appellant in No. 72-1064; Defendant-Appellee in No. 72-1120).*

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* Of the United States District Court for the Southern District of New York, sitting by designation.

ZACHARY SHIMER, New York, N.Y. (Paul G. Pennoyer, Jr., Irene C. Warshauer and Chadbourne, Parke, Whiteside & Wolff, New York, N.Y., on the brief), *for Piper Aircraft Corporation, Howard Piper, Thomas F. Piper and William T. Piper, Jr. (Defendants-Appellees in No. 72-1064).*

JAMES V. RYAN, New York, N.Y. (William L. D. Barrett, C. Kenneth Shank, Jr. and Webster Sheffield Fleischmann Hitchcock & Brookfield, New York, N.Y., on the brief), *for Bangor Punta Corporation (Defendant-Appellee in No. 72-1604; Plaintiff-Appellant in No. 72-1120; Defendant-Appellee-Appellant in Nos. 72-1053 and 72-1140) and for Nicolas M. Salgo and David W. Wallace (Defendant-Appellees in No. 72-1064).*

JOHN F. ARNING, New York, N.Y. (Roger L. Waldman, Charles W. Sullivan, and Sullivan & Cromwell, New York, N.Y., on the brief), *for The First Boston Corporation, Paul L. Miller and Nicholas H. Bayard (Defendants-Appellees in No. 72-1064).*

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TIMBERS, *Circuit Judge:*

PRELIMINARY STATEMENT

These consolidated appeals present important questions, some of first impression, involving the antifraud provisions of the federal securities laws in their application to a contest for acquisition of a controlling stock interest in a target corporation. Among the questions presented are those involving the scope of liability and relief under Section 14(e) of the Securities Exchange Act of 1934 and the type of relief necessary, in an SEC enforcement proceeding, to effectuate the broad remedial purposes of the federal securities laws.

The appeals are from judgments entered after non-jury trials of three separate but related civil actions in the Southern District of New York before Milton Pollack, *District Judge.*

In *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corporation, et al.* (No. 72-1064), Chris-Craft appeals from the district court's dismissal after trial of its complaint against all defendants, 337 F.Supp. 1128 (S.D.N.Y. 1971), essentially on the grounds that many of the alleged securities laws violations had not been proven, that those proven had not caused injury to Chris-Craft and that Chris-Craft had failed to prove its claim for damages. We reverse and remand.

In *Bangor Punta Corporation* v. *Chris-Craft Industries, Inc.* (No. 72-1120), Bangor Punta appeals from the district court's dismissal after trial of its complaint, 337 F.Supp. 1147 (S.D.N.Y. 1971), on the ground of insufficient evidence to support Bangor Punta's claims that Chris-Craft had violated the securities laws or that such violations had caused injury to Bangor Punta. We affirm.

In *SEC* v. *Bangor Punta Corporation* (Nos. 72-1053 and 72-1140), the SEC appeals from those provisions of the

district court's judgment after trial, 331 F.Supp. 1154 (S.D.N.Y. 1971), which denied a permanent injunction against further violations of the securities laws and which imposed a condition upon Bangor Punta's rescission offer to former Piper shareholders. On the SEC's appeal, to the extent the judgment is appealed from, we affirm in part, and reverse and remand in part. On Bangor Punta's cross-appeal, we affirm.

I.

EVENTS LEADING TO INSTANT LITIGATION

Before turning to the issues raised on appeal in each of the three actions, we shall set forth a narrative of the events, beginning in the latter part of 1968 and during 1969 in connection with the contest for control of Piper Aircraft Corporation, which culminated in the instant litigation. Facts having specific bearing upon the issues in each of the three appeals will be discussed in more detail in connection with our rulings below on those issues in each case.[1] Our task on these appeals has been greatly facilitated by Judge Pollack's detailed, comprehensive findings of fact, and particularly by his evaluation of the facts as found. While we disagree with certain of his conclusions, as will appear below, we take this occasion to com-

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1 **The facts are substantially undisputed.**

We shall assume familiarity with the detailed statements of facts set forth in the prior reported opinions involving this contest for control of Piper. In addition to the three opinions of Judge Pollack referred to above (337 F.Supp. 1128, 337 F.Supp. 1147, 331 F.Supp. 1154), there was an earlier opinion by Judge Tenney denying Chris-Craft's motion for a preliminary injunction (303 F.Supp. 191 (S.D.N.Y. 1969)), and an en banc opinion by this Court affirming the denial of the preliminary injunction, indicating certain violations of the securities laws and remanding to the district court for further proceedings not inconsistent with this Court's opinion. *Chris-Craft Industries, Inc.* v. *Bangor Punta Corp.*, 426 F.2d 569 (2 Cir. 1970) (en banc).

mend him upon the clarity of his opinions in these complex cases.

Chris-Craft Industries, Inc. (CCI) is a Delaware corporation. It is a diversified manufacturer of recreational products. Its securities, common and preferred stock and convertible debentures, are traded on the New York Stock Exchange (NYSE).

Piper Aircraft Corporation (Piper) is a Pennsylvania corporation. It is one of the nation's leading manufacturers of light aircraft. Its 1,644,890 shares of issued and outstanding stock were traded (during periods relevant to these appeals) on the NYSE from October 1, 1968 to August 11, 1969 and then on the Philadelphia-Baltimore-Washington Stock Exchange. The three individual Piper defendants (referred to herein as the "Piper family") were officers and directors of Piper and owned about 325,000 of the 1,644,890 outstanding Piper shares.

Bangor Punta Corporation (BPC) is a Delaware corporation. It is a conglomerate with holdings in diversified fields. Its securities are traded on the NYSE. Defendants Nicolas M. Salgo and David W. Wallace are principal officers and directors of BPC.

The First Boston Corporation (First Boston) is a Massachusetts corporation. It is an investment banking firm and also a registered broker-dealer. In connection with the events involved herein, it served as investment adviser to Piper and as underwriter for BPC. Defendant Paul L. Miller is president of First Boston and defendant Nicholas H. Bayard is a vice president in its underwriting department.

In the latter part of 1968, CCI undertook a large financing program designed to produce excess cash that could be used primarily for acquisitions. On October 30, 1968, CCI filed a registration statement and preliminary prospectus for

an offering of 6% convertible debentures up to $26 million in principal amount. The offer was made to shareholders and executives of CCI. It was largely successful, producing over $25 million in excess cash. At about the same time, Herbert Siegel, CCI's president and chief executive officer, discussed with the Philadelphia National Bank the obtaining of a revolving line of credit of up to $15 million. Such credit was granted and was drawn upon in February 1969 when needed.

CCI made its first purchase of Piper stock on December 30, 1968.[2] The purchase totalling 5200 shares was made through a confidential numbered account at Mitchell, Hutchins & Co., Inc., a member of the NYSE and a registered broker-dealer retained primarily by institutional investors. Additional purchases of Piper stock were made through Mitchell, Hutchins shortly thereafter in 1969:

January 3	36,100 shares (34,200 from Madison Fund at $54)
January 6	22,000
January 7	700
January 8	30,900 (all but 200 from Keystone Growth Fund)

CCI also made market purchases of Piper stock in the following amounts through other brokers:

January 14	3,700 shares
January 20	800
January 21	3,200

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2 CCI as of this date apparently had not yet decided to seek a controlling interest in Piper. Mr. Siegel testified that he had decided to buy the 5200 shares only a few days in advance and that he had not yet determined that an attempt to take over Piper would be advisable. The Board of Directors of CCI did not openly discuss the acquisition of Piper until its January 23, 1969 board meeting.

On January 22, CCI negotiated the purchase of 101,100 shares of Piper stock from Technology Fund, Inc. at $65 per share. This brought its total holdings in Piper to over 200,000 shares, approximately 13% of the outstanding Piper shares.

Up to this point, CCI had not officially informed Piper of its extensive purchases of Piper stock, nor had a public announcement been made.[3] On the morning of January 23, Mr. Siegel telephoned Mr. W. T. Piper, Jr., then President of Piper, and informed him that CCI would be announcing that day a cash tender offer for the purchase of Piper stock and that CCI had tentative plans to acquire a majority shareholder interest in Piper. In a statement released to the press that day, CCI announced a cash tender offer beginning immediately and ending on February 3 for up to 300,000 shares of Piper at $65 per share. The price of Piper stock on the NYSE at the close of January 22 was $52.50. CCI also revealed in its press release of January 23 that it was purchasing the stock for investment with a view to control of Piper, but that it did not presently have any specific plan or proposal with respect to the future of Piper.

The first response of the Piper management (essentially the Piper family) to the tender offer was to call a meeting on January 23 of representatives of First Boston (Piper's investment adviser), Chadbourne, Parke, Whiteside and Wolff (Piper's legal counsel), and Arthur Young & Co. (Piper's auditors). The next day, January 24, the Piper family decided to oppose CCI's bid for control of Piper. First Boston was asked to contact other companies to

3 Section 13(d)(1) of the Securities Exchange Act of 1934, 15 U.S.C. §78m(d)(1) (1970), requires that certain reports be filed by a purchaser when he has acquired more than 10% of the outstanding stock of a company. CCI satisfied this requirement by filing a Schedule 13D with the SEC along with its tender offer materials.

solicit proposals which might be preferable to a CCI takeover. BPC was one of the companies contacted. It showed considerable interest. But Piper did not follow up at that time.

The Piper family's resistance to the CCI tender offer took several forms. On January 25, the Piper Board adopted a resolution that CCI's offer was not in the best interests of the Piper shareholders and decided that this resolution should be sent to them. Letters were sent out the same day asking Piper shareholders to delay accepting the CCI offer until the Piper management could adequately respond to it. This was followed by a letter dated January 27 over the signature of W. T. Piper, Jr.[4] The letter stated, among other things, that the Piper Board "has carefully studied this offer and is convinced that it is inadequate and not in the best interests of Piper's shareholders."

Also on January 25, Piper officers met with officers of Grumman Aircraft Engineering Corporation (Grumman) to discuss the sale of 300,000 unissued but authorized Piper shares to Grumman at $65 per share. An agreement was entered into on January 28 under which Grumman agreed to purchase 300,000 Piper shares at $65 per share; Piper agreed to seek approval from the NYSE for the listing of the new shares; and Grumman agreed to tender a check for $19,500,000 at a closing to be held within 3 days of the NYSE approval. The agreement was entered into with "the intention of Grumman and Piper to explore the desirability of a merger of their two corporations". Under the agreement, Grumman was given an option to put the shares back to Piper after six months at Grumman's cost plus 3½% interest per annum running from the closing

4 This letter was prepared by D. F. King & Co. It was reviewed by the Piper family, by its legal counsel and by Mr. Bayard of First Boston.

date. In order to guarantee the option, Piper was required to maintain the proceeds of the sale in a fund separate from its other assets and free of liens. A press release was issued by Piper on January 29 announcing that Grumman "has agreed to purchase" 300,000 shares of Piper subject to the approval of the Boards of both companies. The release further stated that the agreement was also conditioned on the shares being listed with the NYSE, on there being no material adverse change in Piper's business, and on there being no change in the management of Piper. A letter tracking the language of the release was sent to Piper shareholders on the same day. There was no mention of the "put" arrangement in either the press release or the letter to shareholders. The Grumman agreement was terminated by mutual consent on March 19 after the NYSE advised the parties that it would not list the new shares.

Returning to CCI's program for purchasing Piper stock, its tender offer resulted in its acquiring an additional 304,606 shares of Piper. This boosted CCI's total holdings[5] to 547,106 shares, or approximately 33% of the outstanding shares of Piper as of February 3. To obtain the additional 17% necessary for control, CCI decided to make an exchange offer. On February 14, the Board of CCI approved the making of an exchange offer without determining its terms. On February 27, CCI filed with the SEC an S-1 registration statement and a preliminary prospectus for an exchange offer to acquire a minimum of 80,000 and a maximum of 300,000 Piper shares. CCI issued a press release on May 7 announcing the specific package of CCI securities to be exchanged for Piper shares. First Boston

5 While the tender offer was outstanding, CCI continued to purchase Piper stock on the market. On January 24, 16,200 shares were purchased. Between January 27 and February 3, another 22,600 shares were purchased.

estimated that the package was worth $70-74 per Piper share. On May 12 and 16, the Board of CCI adopted resolutions approving the exchange offer and increased the value of the package by adding $10 cash.

Between March 18 and April 7, CCI had issued orders to Mitchell, Hutchins to continue purchases of Piper stock for CCI's account. CCI actually purchased 9100 shares while its exchange offer was being processed. On April 7, however, Mr. Siegel met with the SEC which warned him that such purchases violated Rule 10b-6 as the SEC interpreted it. Mr. Siegel informed the SEC that CCI would cancel all outstanding orders and it did.

In the meantime, the Piper management continued to search for an effective maneuver to defeat CCI. On March 22, Piper entered into an agreement with United States Concrete Pipe Company of Florida to acquire all the outstanding shares of Concrete Pipe in exchange for 320,000 authorized but unissued Piper shares. On the same day, Piper agreed to acquire 99.466% of the shares of Southply, Inc. in exchange for 149,199 authorized but unissued shares of Piper. Piper apparently hoped that, by increasing the number of Piper shares outstanding, CCI would find Piper less attractive. The NYSE refused to list the new shares because the Piper family had failed to obtain the approval of Piper shareholders for the deals. When Piper itself issued the stock certificates, an extremely unconventional procedure, the NYSE suspended trading in Piper stock beginning April 7 and initiated delisting procedures. Piper rescinded the agreements on April 14.

Going back for a moment to CCI's program for purchasing Piper stock, its tender offer between January 23 and February 3 had resulted in its bringing its total holdings of Piper shares to 547,106 or roughly one-third of Piper's outstanding shares (including those privately purchased). Pursuant to its February 27 exchange offer (which termi-

nated July 24), CCI acquired 39,826 additional Piper shares. And pursuant to its July 24 exchange offer (announced on May 7, approved by the CCI Board on May 12 and 16, and terminated on August 4), CCI acquired 112,089 additional Piper shares—thus bringing its total holdings of Piper shares to 668,295 or 41% of Piper's outstanding shares.

BPC's first contact with the contest for control of Piper came on January 24 when First Boston spoke to Nicolas M. Salgo, BPC's Chairman of the Board, about the possibility of a deal between Piper and BPC. Mr. Salgo showed some interest but Piper broke off contact until February 24 when there was a meeting of Piper and BPC representatives concerning a merger of the two companies. BPC officials demanded that the Piper family sell to BPC all its holdings in Piper, which amounted to 31% of the outstanding shares. The Piper family gave no answer at that time. Further meetings were held on April 18 and 20. The Piper family did not decide to sell until late April or early May.

On May 8, a formal agreement was entered into between BPC and the Piper family. BPC made a "limited exchange offer" of specified BPC stock, warrants, and debentures (valued by First Boston at $70-72 per Piper share), for the total Piper family holdings of Piper stock, 501,090 shares. BPC also promised to use its best efforts to acquire additional stock to bring its holdings up to more than 50% of the outstanding Piper stock by a "further exchange offer" of "Bangor Punta securities and/or cash having a value, in the written opinion of the First Boston Corporation, of $80 or more per Piper share". It was further agreed that if BPC were successful in gaining control of Piper, and if First Boston determined that the package of securities received by the Piper family were valued at less than $80 on the opening day of the general

exchange offer, the Piper family would be given stock and/or cash to make up the difference.

On May 8, a statement was released to the press by both Piper and BPC disclosing that BPC was acquiring the Piper family's stock holdings through an exchange offer for a package of BPC securities. The release contained a statement that BPC would offer to the remaining Piper shareholders a package of BPC securities to be valued in the judgment of First Boston "at not less than $80 per Piper share". This $80 valuation was repeated by David W. Wallace, President of BPC, to a reporter for the Wall Street Journal on May 16.

On May 26, the SEC brought an action against Piper and BPC in the District Court for the District of Columbia charging that the May 8 press release violated §5(c) of the Securities Act of 1933, 15 U.S.C. §77e(c) (1970), and Rule 135, 17 C.F.R. §230.135 (1972), in that the release constituted an offer to sell securities before any registration statement had been filed, the $80 valuation having overstepped the Rule 135 exemption (a contention with which our Court agreed in its earlier en banc decision, 426 F.2d at 574). Both defendants consented to a permanent injunction without admitting any of the allegations of the complaint.

On May 16, BPC filed with the NYSE and the SEC a Schedule 13D describing the May 8 agreement. On May 29, BPC filed an S-1 registration statement for both of the exchange offers, and also filed a preliminary prospectus for the "further exchange offer". The May 29 offering, described as a tentative offering, was as follows:

1 share of BPC common
Series C warrants expiring 3-31-81 to purchase 3.25 shares of BPC common at $55
$15 principal amount of new 5½% convertible subordinate debentures, due 1994, convertible at $55

While awaiting SEC action on the exchange offer, BPC negotiated cash purchases of a total of 120,200 shares of Piper stock in the following private transactions: On May 14, BPC purchased 78,600 Piper shares from Fund of Funds Proprietary Fund, Inc. in Nassau at $79.25 per share. On May 15, BPC purchased an additional 20,000 Piper shares for $74.25 per share from American Securities Corporation. On May 16, 20 and 23, in three separate transactions, BPC purchased from Bay Securities Corporation the following Piper shares at the prices indicated:

May 16	2,300	$76
	700	75.95
May 20	11,200	76.25
May 23	2,200	76.37
	5,200	78.37

All these purchases were made in disregard of SEC Exchange Act Release No. 8595, issued May 5, 1969, announcing proposed Rule 10b-13. This Rule, when adopted, would specifically prohibit BPC's purchases because they were made during the pendency of an exchange offer for the purchased shares. The Release stated that "[t]his provision is, in effect, a codification of existing interpretations under Rule 10b-6."

The Piper family naturally supported the BPC exchange offer and took several steps to ensure its success. On June 4, a letter over the signature of W. T. Piper, Jr. was sent to all Piper shareholders urging them to read and study carefully the preliminary prospectus on the BPC exchange offer. Another shareholder letter was sent on June 20 extensively criticising the CCI exchange offer and suggesting that the offer "is not in your best interests". Finally, on July 25, a week after the BPC offer had become effective, W .T. Piper, Jr. sent another letter to shareholders strongly recommending the BPC offer; it stated that the Piper management had been impressed with the BPC management and operations and that a combination with BPC would be in the best interests of all shareholders.

BPC did not fix the final terms of its exchange package until July 18, the day it became effective. The final offer consisted of the following securities:

1.2 shares of BPC common
Warrants for 3.5 shares of BPC common
$31 principal amount of new 8¼% convertible subordinate debentures, due 1994, convertible at $55

On July 18, First Boston sent to BPC an opinion letter which valued the combination of BPC securities at not less than $80 per Piper share based on market and other conditions existing prior to the opening of business on that day. Neither the preliminary nor the final prospectus on the BPC exchange offer—nor the First Boston opinion letter—referred to BPC's negotiations with another company for the sale of the Bangor and Aroostook Railroad, a major asset of BPC, for $5 million, which was $13.5 million less than the amount at which it was carried on the books. We shall discuss this more fully below.

To summarize CCI's public offers, on January 23, CCI had made its first tender offer for 300,000 Piper shares. By February 3, these efforts, together with its negotiated purchases, had gained CCI approximately 33% of the then outstanding Piper shares. On February 27, CCI filed with the SEC a registration statement and proposed prospectus for an exchange offer for a minimum of 80,000, a maximum of 300,000, additional Piper shares; after the period of this exchange offer had been extended six times, it finally was withdrawn on July 24 when CCI failed to obtain the minimum 80,000 shares. Still another exchange offer was

announced by CCI on May 7, adding substantially more value to its earlier package; a new registration statement for this exchange offer was filed with the SEC on July 22; and a new prospectus was filed on July 24, the effective date of the offer.

The BPC exchange offer expired on July 29 with BPC acquiring 111,628 shares. CCI's second offer expired on August and produced 112,089 shares.

The contest for control was not yet over, however, because after the expiration of both offers CCI and BPC owned only 41% and 45%, respectively, of the outstanding Piper shares. CCI made additional purchases of 29,200 shares between August 12 and 18, and then virtually withdrew from the struggle. BPC, on the other hand, continued to purchase for cash on the NYSE until August 11, and then purchased on the PBWSE until September 5. By September 5, it had acquired another 100,614 shares, enough to achieve a majority stockholder position in Piper (839,306 shares or 51%).

CCI had lost the battle for control after investing more than $44 million—$38,295,238 in cash and $6,333,029 in other forms of consideration such as stocks and warrants.

II.

CHRIS-CRAFT INDUSTRIES, INC. v. PIPER AIRCRAFT CORPORATION, ET AL. (NO. 72-1064)

On May 22, 1969, while the contest for control of Piper was still being waged, CCI brought this action in the District Court for the Southern District of New York. The amended complaint alleged violations of Section 5(c) of the Securities Act of 1933, 15 U.S.C. §77e(c) (1970), and Rule 135 promulgated under the 1933 Act, 17 C.F.R. §230.135 (1972); it also alleged violations of Sections 9,

10(b) and 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §§78i, 78j(b) and 78n(e) (1970), and Rules 10b-5 and 10b-6 promulgated under the 1934 Act, 17 C.F.R. §§240.10b-5 and 240.10b-6 (1972). The complaint sought damages and equitable relief.

On July 22, CCI moved for a preliminary injunction to prevent BPC from gaining and exercising control of Piper. Judge Tenney denied CCI's motion for a preliminary injunction on the grounds that CCI had failed to establish either irreparable injury if the motion were denied or unlawful conduct on the part of BPC. 303 F.Supp. 191.

An expedited appeal from Tenney's order resulted in an en banc decision by this Court. *Chris-Craft Industries, Inc.* v. *Bangor Punta Corp.*, 426 F.2d 569 (2 Cir. 1970). We held, in an opinion written by Judge Waterman, that a preliminary injunction was not required because BPC had stipulated upon oral argument not to effect a merger before the end of the litigation and we could perceive no other irreparable harm. We also ruled on the district court's alternative holding that the securities laws had not been violated, "for it [was] clear that this ruling below would determine the outcome of the trial on the merits." *Id.* at 573. We held that the May 8 press release violated §5(c) of the 1933 Act and Rule 135;[6] and that BPC's cash purchases of large blocks of Piper stock in May violated Rule 10b-6, but we made no determination whether the latter transactions were exempt under Rule 10b-6(a)(3)(2), which we discuss more fully at pages 4959-4963, *infra*. We remanded to the district court for proceedings not inconsistent with our opinion.

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6 The release was an "offer to sell" because it contained a statement of value and it was unlawfully issued prior to the filing of a registration statement.

On remand, CCI limited its claim for relief to damages, foregoing any claim for equitable relief.[6a] After trial on the merits before Judge Pollack, the district court filed an opinion. 337 F.Supp. 1128. The court found no merit in CCI's contentions that the Piper management misled the public by its January 23 letter which stated that CCI's cash tender offer was "inadequate", that the announcement of the Grumman agreement was deceptive because it failed to disclose the "put" provision, or that other January communications were misleading. The court rejected CCI's claim that the May 8 release was inaccurate, if "taken in its own terms". It found that, although the release violated §5(c) of the 1933 Act, CCI had failed to show that this violation caused it to lose the contest or to increase unnecessarily its cost of acquiring Piper stock. The court held that the BPC registration statement for its exchange offer was "unintentionally in error" in failing to disclose the negotiations for the sale of the Bangor and Aroostook Railroad, but that CCI had failed to prove the scienter and causal effect necessary for a Rule 10b-5 or §14(e) cause of action for damages brought by a party in the position of CCI. The court held that BPC's May cash purchases had violated Rule 10b-6 and were not exempt, but that the violations did not cause injury to CCI. The court faulted Piper for failing to disclose certain matters in its annual statements and other reports, but decided that CCI was not in a position to complain. With regard to the claims against First Boston, the court concluded that First Boston had not engaged in any conduct which operated as a fraud upon CCI or the public shareholders of Piper and that it should not be held liable for the actions of its client. The court held that Piper had failed to prove its counterclaim

6a CCI also amended its complaint to allege violations of §16 of the 1934 Act, 15 U.S.C. §78p (1970).

against CCI by not adequately showing violations of the law or that such violations were related to injury sustained by Piper. The court dismissed CCI's complaint against the corporate defendants and against each of the individual defendants.[7]

For the reasons stated below, we reverse and remand with directions to grant appropriate relief.

(A) Function of Private Action for Damages in Enforcement of Federal Securities Laws

In order better to understand our rulings on the issues raised on this appeal—including our disagreement with the district court on certain issues—we believe it may be helpful briefly to delineate the proper function of the private action for damages in the overall pattern of enforcement of the federal securities laws.

This matter is squarely raised by the following observation by the district court in ruling on CCI's claims of violations of the antifraud provisions of the securities laws:

> "In effect, Chris-Craft seeks the windfall of a punitive award against Bangor Punta by assuming the role of defender of the public interest in the purity of the registration process. This role has already been assumed by the Commission and we could well expect it to be assumed by exchanging Piper holders if there were material harm to them." 337 F.Supp. at 1139.

The SEC of course has been entrusted—by the statutes and implementing decisions—with the primary responsibility of protecting the public interest under the federal secu-

7 On appeal, CCI does not claim damages for BPC's violation of §5(c) of the 1933 Act, and it has dropped its claim that Piper directly deceived CCI as a purchaser of Piper shares by false and misleading statements in Piper's financial and other reports.

Piper has not appealed from the dismissal of its counterclaim.

rities laws. But the Supreme Court, as well as other federal courts including our own, have recognized that vigorous enforcement of the federal securities laws, particularly the antifraud provisions, can be accomplished effectively only when implemented by private damage actions. In *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964), the Supreme Court emphasized that private actions provide "a necessary supplement to Commission action" and that "the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement" of the securities laws. 377 U.S. at 432. See *Fischman* v. *Raytheon Mfg. Co.,* 188 F.2d 783 (2 Cir. 1951); *Speed* v. *Transamerica Corp.,* 235 F.2d 369 (3 Cir. 1956).

This policy of vigorous enforcement through private litigation has been the instrument for forging many salutary developments in the securities fraud area, including a broadening of standing to sue and a relaxation of the elements of proof in a private action. A private right of action for damages has been implied for purchasers or sellers defrauded in violation of Rule 10b-5. *Kardon* v. *National Gypsum Co.,* 69 F.Supp. 512, 513-14 (E.D.Pa. 1946). Shareholders deceived by misleading proxy solicitations have been held to have a cause of action under §14(a) of the 1934 Act, 15 U.S.C. §78n(a) (1970). *J. I. Case Co.* v. *Borak, supra.* The scienter requirement in a Rule 10b-5 private damage action appears to have been reduced to a knowledge of falsity or reckless disregard for the truth standard by our decisions in *Heit* v. *Weitzen,* 402 F.2d 909, 914 (2 Cir. 1968), *cert. denied,* 395 U.S. 903 (1969), and *Globus* v. *Law Research Service, Inc.,* 418 F.2d 1276, 1290-91 (2 Cir. 1969), *cert. denied,* 397 U.S. 913 (1970), "to insure the maintenance of fair and honest markets in . . . [securities] transactions." Section 2 of the 1934 Act, 15 U.S.C. §78b (1970). The reliance standard also has been relaxed under certain circumstances; for example, if a material omission or misstatement is proven, a presumption may be raised that the plaintiff relied on the deception to his detriment. See *Affiliated Ute Citizens of Utah* v. *United States,* 406 U.S. 128, 153-54 (1972) (Rule 10b-5 violation); *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375, 385 (1970) (§14(a) violation). These are merely examples of innovations that have been prompted in substantial part by a uniform policy of encouraging vigorous enforcement of the securities laws through private litigation.

To understand the indispensability of private actions in the securities area, and the necessity for facilitating such litigation, it may be illuminating to focus upon the reasons Congress enacted the antifraud and antimanipulation provisions of the statutes. Obviously Congress was concerned about the plight of the average public investor who is at a serious disadvantage in dealing with persons possessing superior knowledge, skill and resources. But the public in the role of investor is only part of the picture. The integrity and efficiency of the securities markets are even more important since our entire economy is dependent upon these markets. The securities market performs the essential function of assessing the value that society places upon the efforts of a particular enterprise so that society can obtain the maximum amount of its preferred goods and services that our resources can produce. This function can be performed effectively only if the delicately calibrated balance of factors affecting demand and supply are allowed to have their impact upon the market place through an unrestricted flow of information and funds. See Crossland & James, *The Gods of the Marketplace: An Examination of the Regulation of the Securities Business,* 48 B.U.L. Rev. 515 (1968). The securities laws seek to prevent restrictions which distort the market's estimate of value. Considering the weighty interests at stake, Congress and the courts justifiably have outlawed

all unfair and deceptive practices related to the trading of securities and have encouraged private damage actions to implement the enforcement of the federal securities laws.[8]

(B) Violations of Antifraud Provisions of Section 14(e) of 1934 Act

We turn now to one of the key issues on these appeals: CCI's claim that each of the defendants violated Section 14(e) of the Securities Exchange Act of 1934. We hold that they did.

We shall discuss seriatum with respect to this claim each of the subordinate issues as briefed and argued by the parties, namely, (1) standing of CCI to sue for damages, (2) defendants' violations of Section 14(e), and (3) causation. Then, after discussing CCI's further claim of violations of Rule 10b-6, we shall take up the form of relief to be granted.

(1) *Standing of CCI to Sue for Damages*

CCI claims that defendants violated Rule 10b-5 or §14(e) when, during the pendency of CCI's attempt to take over Piper, BPC and Piper issued improper and misleading press releases, BPC filed an exchange offer registration statement with material omissions, and the Piper family sent out shareholder letters with material omissions and

8 Discernment must be exercised in determining whether a particular violation of an antifraud provision brings into play the policy of vigorous enforcement with all its effects. The Supreme Court's recent decision in *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 11-13 (1971), indicates that a Rule 10b-5 cause of action may be stated even though the fact that a security somehow was involved in the underlying transaction is otherwise insignificant. In such cases, although there may have been a securities law violation, the harm caused by the violation may not be regarded as sufficiently momentous to justify a dilution of the standards of proof normally required in an action for fraud.

misstatements. All the alleged violations relate either to a cash tender offer or to an exchange offer the purpose of which was to secure for the offeror a majority shareholder position in the target corporation.

Defendants contend that CCI lacks standing to complain of their alleged violations of Rule 10b-5 or §14(e).

The district court found it unnecessary to decide whether CCI had standing under Rule 10b-5 because there was a failure to show causation; and it found that it was "unnecessary to decide whether §14(e) may be separately invoked by one competitor for corporate control against another" since "our 10b-5 conclusions are dispositive of the issues as raised under Section 14(e)". 337 F.Supp. at 1134 and 1140.

We hold that CCI does have standing under §14(e) to sue defendants for damages. Our holding is based on the statute itself and such decisional law as there is that has touched on the question.

Section 14(e) of the Exchange Act, 15 U.S.C. §78n(e) (1970), provides:

> "It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation."

The Senate Report which accompanied proposed §14(e) indicates clearly—more specifically than does Rule 10b-5[9]—

9 Rule 10b-5 under the 1934 Act, 17 C.F.R. §240.10b-5 (1972), provides:

"It shall be unlawful for any person, directly or indirectly, by

that §14(e) was intended to make applicable to a tender offer the long established antifraud proscriptions of the federal securities laws:

> "Proposed subsection (e) would prohibit any misstatement or omission of a material fact, or any fraudulent or manipulative acts or practices, in connection with any tender offer, whether for cash, securities or other consideration, or in connection with any solicitation of security holders in opposition to or in favor of any tender offer. This provision would affirm the fact that persons engaged in making or opposing tender offers or otherwise seeking to influence the decision of investors or the outcome of the tender offer are under an obligation to make full disclosure of material information to those with whom they deal." S. Rep. No. 510, 90th Cong., 2d Sess. (1968), quoted in U.S. Code Cong. & Admin. News 2811, 2821 (1968).

See also *H. K. Porter Co.* v. *Nicholson File Co.*, —— F.Supp. ——, —— (D.R.I. 1972), 4 CCH Fed. Sec. L.Rep. ¶93,703, at 93,079-81 (Nov. 30, 1972).

Section 14(e) is especially appropriate where, as in the instant case, the tender offer, in connection with which fraud is charged, was made with a view to obtaining control of a target company. The Williams Act of 1968, of which §14(e) is a part, was enacted to control what has become

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the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

an increasingly popular method of corporate acquisition—obtaining a majority of a corporation's stock rather than its assets. See Mundheim, *Tender Offers*, 2 Rev. of Securities Reg. 953 (1969). The Act added to §13 of the 1933 Act subsections (d) and (e), which require tender offer disclosures similar to those required for issuance of new securities. Section 14(e) provides for openness and truthfulness in the solicitation of shares through tender offers and in the opposition to such solicitation.

Although the fraudulent acts involved in the instant case literally are proscribed by Rule 10b-5, we conclude that §14(e) is the antifraud provision which more appropriately provides the basis for CCI's standing to sue here. It therefore is unnecessary for us to decide whether CCI has standing to sue under §10(b) and Rule 10b-5.

A corporation in the position of CCI undoubtedly has standing to sue in a constitutional sense on the basis of the illegal acts alleged in the instant action.[10] Those who

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10 The issue of standing to which we address ourselves is whether CCI is an appropriate party to be seeking relief on account of defendants' illegal conduct. As stated in *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968), quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962), a threshold question is presented by the provision in Article III, Section 2, of the United States Constitution, limiting federal judicial power to cases and controversies:

> "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends . . . .'"

While a personal stake in the outcome meets the Article III requirement, a court must take into account other considerations before deciding that a plaintiff has standing to sue.

In the absence of a specific provision in a federal statute authorizing suit, the Constitution requires that we analyze the statute to ascertain whether a federal cause of action can be derived from it in favor of the plaintiff. See *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). Depending on the statute, Congress may have intended, for any number of reasons, that only certain persons should be entitled to sue thereunder, and the plaintiff may not be one of them. See *Birnbaum*

make tender offers have an economic interest in restricting their opponents to fair conduct, for fear that they themselves might incur injury because of practices which they are legally barred from meeting in kind. CCI's allegations indicate that it has "a personal stake in the outcome of the controversy", *Baker* v. *Carr*, 369 U.S. 186, 204 (1962), because it has suffered a pecuniary loss directly attributable to the defendants' acts. See generally *Flast* v. *Cohen*, 392 U.S. 83, 94-101 (1968). Thus, under the requirements of the cases or controversies clause of the United States Constitution, CCI is an appropriate party to complain of such illegal acts.

We must also decide, however, whether CCI has a private federal right of action under §14(e) against each of the defendants and, more specifically, whether it has a claim for compensatory damages.[11] Cf. *Dyer* v. *Eastern*

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v. *Newport Steel Corp.*, 193 F.2d 461 (2 Cir.), *cert. denied*, 343 U.S. 956 (1952). On the other hand, Congress may have authorized the plaintiff to bring suit but limited the type of relief to which he is entitled. In short, the Constitution or statutory scheme enacted by Congress should be closely examined to determine whether the particular action brought by the plaintiff is explicitly or implicitly authorized.

The question whether a right of action or claim for relief exists under federal law is conceptually different from the *Flast* question. While attempting to make clear which concept we are discussing, we nevertheless shall refer to both as questions of "standing" since that is the term used in our prior decisions referring to §14(e). See, e.g., *Butler Aviation International, Inc.* v. *Comprehensive Designers, Inc.*, 425 F.2d 842, 843 n. 1 (2 Cir. 1970); *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787, 798-99 (2 Cir. 1969), *cert. denied*, 400 U.S. 822 (1970); *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F.2d 963, 969-70 (2 Cir. 1969), *cert. denied*, 399 U.S. 909 (1970); *Electric Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 944-46, 948 (2 Cir. 1969).

11 A party with a sufficient economic or legal interest at stake conceivably might be permitted to bring an action to vindicate the public interest. That is, although his own interest was not intended to be protected by the statute, he might be allowed to sue, because of his own economic interest in the result, on behalf of those whose interests were to be protected. Cf. *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 476-77 (1940); *Mutual Shares* v. *Genesco*, 384 F.2d 540, 543-46 (2 Cir. 1967). But in such a suit by a "private attorney general", compensatory damages normally would be improper relief, although punitive damages might be permitted.

Trust and Banking Co., 336 F.Supp. 890, 913-14 (D.Maine 1971). The statute is silent as to a private remedy. In deciding this issue, however, we are not writing from a clean slate. Our Court has spoken on the issue on at least four previous occasions. In *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 940-41, 944-46 (2 Cir. 1969), our holding on the merits made it unnecesssary for us to reach a decision on the standing question, but we did indicate that a target corporation and nontendering shareholders could bring an action for a preliminary injunction under §14(e) against an offeror charged with wrongdoing. In *Butler Aviation International, Inc.* v. *Comprehensive Designers Inc.*, 425 F.2d 842, 843 n. 1 (2 Cir. 1970), a target corporation sought a preliminary injunction and we expressly held that standing existed under §14(e), at least as to the misstatements in the anual report. See also *Susquehanna Corp.* v. *Pan American Sulphur Co.*, 423 F.2d 1075 (5 Cir. 1970). In *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2 Cir. 1969), *cert. denied*, 400 U.S. 822 (1970), after holding that a tender offeror had a Rule 10b-5 claim for relief against a target corporation under the "forced seller" principle, we went on to say that:

> "The amendment to the Act adding section 14(e) (15 U.S.C. §78n(e)), . . . should serve to resolve any doubts about standing in the tender offer cases, even where an offeror is not, as is Crane, in the position of a forced seller." 419 F.2d at 798-99.

See also *H. K. Porter Co.* v. *Nicholson File Co.*, *supra*, 4 CCH Fed.Sec.L.Rep. at 93,079-81. In upholding the dis-

missal of a Rule 10b-5 claim in another action brought by an offeror against a target corporation, we suggested that standing might be provided by §14(e) although the 1968 amendment is an indication that "there was no standing to sue under Rule 10b-5 by either the tender offeror or by the target corporation". *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F.2d 963, 969-70 (2 Cir. 1969), *cert. denied*, 399 U.S. 909 (1970).

While we have not heretofore squarely held that a private right of action for damages can be implied from §14(e) in favor of a party in CCI's position, we have indicated that such an implied right of action would be reasonable. Section 14(e) prohibits, as stated above, material omissions and misstatements in communications favoring or *opposing* tender offers. Under well recognized common law principles, interference with a "prospective advantage", such as the opportunity to purchase property, gives rise to a cause of action in the person injured where the means of interference adopted alone is unlawful, even though the purpose in itself may be justifiable. Prosser & Smith, Cases and Materials on Torts 1131-52 (1967). CCI therefore probably could state a claim for relief in most state courts against each of the defendants for tortious interference. Through unlawful and deceptive practices, they allegedly have denied CCI a fair opportunity to succeed in its tender offers. We will not infer from the silence of the statute that Congress intended to deny a federal remedy and to extinguish a liability which, under established principles of tort law, normally attends the doing of a proscribed act. See *Kardon* v. *National Gypsum Co.*, 69 F.Supp. 512, 513-14 (E.D. Pa. 1946).

We previously have noted, referring to §14(e), that "[t]he legislative history of the 1968 amendment demonstrates that the focus of legislative interest was on the public shareholder; Congress wanted to ensure that he had

the benefit of a full statement from the offeror, with a chance for 'incumbent management' to 'explain its position publicly', if so disposed, H.R. Rep. No. 1711, *supra*, at 2, U.S. Code Cong. & Adm. News at p. 2998." *Electronic Specialty Co.* v. *International Controls Corp.*, *supra*, 409 F.2d at 945; *Susquehanna Corp.* v. *Pan American Sulphur Co.*, *supra*, 423 F.2d at 1085. The general objective surely is to encourage extensive and accurate disclosure of information relevant to a tender offer. The Supreme Court made it clear in *J. I. Case Co.* v. *Borak*, *supra*, 377 U.S. at 432-33, that, in dealing with controversies involving the securities laws, we should not be reluctant to imply a private right of action when to do so will further the general objective of the statute involved. We can conceive of no more effective means of furthering the general objective of §14(e) than to grant a victim of violations of the statute standing to sue for damages. CCI is such a victim, as recognized by common law tort principles. A party in its position is especially likely to vindicate the wrong inflicted upon it. Particularly in light of the enforcement rationale of *Borak*, we believe it is both necessary and appropriate that CCI should be granted standing to sue for damages.

In enacting §14(e), while Congress did not explicitly state that shareholders of a target company are not the only persons entitled to the protection of the securities laws from fraudulent misrepresentations, it is a fair inference that a broader standing was intended. Since Rule 10b-5 covers all types of exchange offers, the major contribution provided by §14(e) would appear to be a broader standing to sue—accorded both to the offeror and to the opposition—based on fraudulent securities transactions. See *Bath Industries, Inc.* v. *Blot*, 427 F.2d 97, 102 (7 Cir. 1970); *Dyer* v. *Eastern Trust and Banking Co.*, 336 F.Supp. 890, 914 (D. Maine 1971). In *Electronic Specialty Co.* v.

International Controls Corp., supra, 409 F.2d at 940-41, we commented on the impact of §14(e):

> "In effect this applies Rule 10b-5 both to the offeror and to the opposition—very likely, except perhaps for any bearing it may have on the issue of standing, only a codification of existing case law."

While Judge Friendly's opinion in *Electronic Specialty* is not dispositive, its holding that the target company may sue goes some distance toward saying that contestants may also sue. Cf. *Iroquois Industries, Inc.* v. *Syracuse China Corp., supra*, 417 F.2d at 969-70.

Our holding on the standing of CCI to sue for damages may be summarized as follows. The statutory language of §14(e) is silent on standing; it neither confers nor excludes standing with respect to one in the position of CCI. As a distinguished commentator said years ago, in such a situation there is no need to try to discover "supposed legislative intent"; [w]hether his offenses shall have any other legal consequence has not been passed on one way or the other as a question of legislative intent, but is left to be determined by the rules of law." Thayer, *Public Wrong and Private Action*, 27 Harv. L. Rev. 317, 320 (1914). Under common law tort principles, we hold that a claim for relief under federal law is stated where, as here, a defeated contestant for control has been put in a minority shareholder position because of the wrongdoing of its opponent and the margin of victory is only 7%. CCI has shown that it had a reasonable chance of obtaining control of Piper, but lost the opportunity because its opponent gained control through means illegal under federal law. This is a case of first impression with respect to the right of a tender offeror to claim damages for statutory violations by his adversary. And our holding is

premised on the belief that the harm done the defeated contestant is not that it had to pay more for the stock but that it got less stock than it needed for control.

We hold that CCI has a right of action for damages against all defendants for violations of §14(e).[12]

(2) *Defendants' Violations of Section 14(e)*

The district court held that the various communications to shareholders by members of the Piper family and the May 8 press release by Piper and BPC did not violate §14(e), but that the BPC registration statement and prospectus were materially misleading. 337 F.Supp. at 1134-38, 1138-40. CCI challenges the court's holdings with respect to the Piper communications to shareholders and the May 8 press release. Defendants contend that the BPC registration statement and prospectus did not violate §14(e). We hold that each of the defendants violated §14(e).

(a) Controlling Principles In Determining Section 14(e) Violations

Before turning to defendants' alleged violations of Section 14(e), a statement of what we believe to be the controlling principles in determining such liability may aid in understanding our rulings which follow.

Section 14(e) is relatively new. It has not been the subject of extensive judicial construction, and never in the context of the factual situation here presented. And yet the underlying proscription of §14(e) is virtually identical

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12 The fraudulent acts alleged to have been committed by Piper and its allies, BPC and First Boston, in effect were in the nature of countersolicitations to CCI's tender offers. CCI's right of action against each therefore is the same: to recover damages or to obtain other relief based on defendants' illegal conduct under §14(e) to achieve an objective injurious to CCI.

to that of Rule 10b-5; the critical difference is that the latter is applicable only "in connection with the purchase or sale of any security", while the former is applicable "in connection with any tender offer . . . or any solicitation of security holders in opposition to . . . any such offer . . . ." In determining whether §14(e) violations were committed in the instant case, we shall follow the principles developed under Rule 10b-5 regarding the elements of such violations. In short, we hold that a violation of §14(e) is shown when there has been a material misstatement or omission concerned with a tender offer and when such misstatement or omission was sufficiently culpable to justify granting relief to the injured party. The key concepts in this formulation are *materiality* and *culpability.*[13]

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13 It is well to bear in mind Judge Friendly's observations regarding §14(e) in *Electronic Specialty Co.* v. *International Controls Corp., supra,* 409 F.2d at 948:

> "The likeness of tender offers to proxy contests is not limited to the issue of standing. They are alike in the fundamental feature that they generally are contests. This means that the participants on both sides act, not 'in the peace of a quiet chamber,' Hellenic Lines Ltd. v. Brown & Williamson Tobacco Corp., 277 F.2d 9, 13 (4 Cir.), cert. denied, 364 U.S. 879, 81 S.Ct. 168, 5 L.Ed 2d 102 (1960), but under the stresses of the market place. They act quickly, sometimes impulsively, often in angry response to what they consider, whether rightly or wrongly, to be low blows by the other side. Probably there will no more be a perfect tender offer than a perfect trial. Congress intended to assure basic honesty and fair dealing, not to impose an unrealistic requirement of laboratory conditions that might make the new statute a potent tool for incumbent management to protect its own interests against the desires and welfare of the stockholders. These considerations bear on the kind of judgment to be applied in testing conduct—of both sides—and also on the issue of materiality. As to this we reaffirm the test announced in *Symington Wayne, supra,* 383 F.2d at 843, whether 'any of the stockholders who tendered their shares would probably not have tendered their shares' if the alleged violations had not occurred. See also General Time Corp. v. Talley Industries, Inc., supra, 403 F.2d at 161-162."

The concept of materiality focuses on the weightiness of the misstated or omitted fact in a reasonable investor's decision to buy or sell. We articulated the materiality standard in *List* v. *Fashion Park, Inc.,* 340 F.2d 457, 462 (2 Cir.), *cert. denied,* 382 U.S. 811 (1965), to be "whether 'a reasonable man would attach importance [to the fact misrepresented] in determining his choice of action in the transaction in question.'"[14] The materiality test is concerned only with whether a prototype reasonable investor would have relied. See *Heit* v. *Weitzen,* 402 F.2d 909, 912-14 (2 Cir. 1968), *cert. denied,* 395 U.S. 903 (1969). Account must be taken of all the surrounding circumstances to determine whether the fact under consideration is of such significance that a reasonable investor would weigh it in his decision whether or not to invest. See *SEC* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833, 849 (2 Cir. 1968) (*en banc*), *cert. denied sub nom. Kline* v. *SEC,* 394 U.S. 976 (1969).

As for the concept of culpability, intent to defraud is not an indispensable element in a private action under Rule 10b-5; knowledge of falsity or reckless disregard for the truth may be sufficient. See *Shemtob* v. *Shearson, Hammill & Co.,* 448 F.2d 442, 445 (2 Cir. 1971); *Globus* v. *Law Research Service, Inc.,* 418 F.2d 1276, 1290-91 (2 Cir. 1969), *cert. denied,* 397 U.S. 913 (1970); *Heit* v. *Weitzen, supra,* 402 F.2d at 913-14; *SEC* v. *Texas Gulf Sulphur Co., supra,* 401 F.2d at 854-55. We have indicated, however, that mere negligent conduct is not sufficient "to permit plaintiffs to recover damages in a private action under §17(a) or §10(b)." *SEC* v. *Manor Nursing Centers, Inc.,* 458 F.2d 1082, 1096 n. 15 (2 Cir. 1972).

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14 And in *SEC* v. *Texas Gulf Sulphur Co., supra,* 401 F.2d at 849: "[M]aterial facts include not only information disclosing the earnings and distributions of a company but also those facts . . . which may affect the desire of investors to buy, sell, or hold the company's securities."

The function of what has been called the "scienter" requirement is to confine the imposition of liability to those whose conduct has been sufficiently culpable to justify the penalty sought to be exacted. The initial inquiry in each case is what duty of disclosure the law should impose upon the person being sued. See *Royal Air Properties, Inc.* v. *Smith*, 312 F.2d 210, 212 (9 Cir. 1962); *Ellis* v. *Carter*, 291 F.2d 270, 274 (9 Cir. 1961). In making this determination we should bear in mind that a major congressional policy behind the securities laws in general, and the antifraud provisions in particular, is the protection of investors who rely on the completeness and accuracy of information made available to them. See 1 Bromberg, Securities Law: Rule 10b-5, §7.1, at 14 (1971). Those with greater access to information, or having a special relationship to investors making use of the information, often may have an affirmative duty of disclosure. When making a representation, they are required to ascertain what is material as of the time of the transaction and to disclose fully "those material facts about which the [investor] is presumably uninformed and which would, in reasonable anticipation, affect his judgment". *Kohler* v. *Kohler Co.*, 319 F.2d 634, 642 (7 Cir. 1963). A failure to perform these duties with "due diligence" in issuing registration materials provides a basis for suit under §11 of the 1933 Act, 15 U.S.C. §77k (1970). A knowing or reckless failure to discharge these obligations constitutes sufficiently culpable conduct to justify a judgment under Rule 10b-5 or §14(e) for damages or other appropriate relief against the wrongdoer. *SEC* v. *Texas Gulf Sulphur Co., supra,* 401 F.2d at 854-55.

In sum, and put as simply as possible, the standard for determining liability under §14(e) on the part of a person making a misleading tender offer, or a responsible officer of a corporation making such such an offer, is whether

plaintiff has established that defendant either (1) knew the material facts that were misstated or omitted, or (2) failed or refused to ascertain such facts when they were available to him or could have been discovered by him with reasonable effort.

Our disagreement with the district court on whether defendants have violated §14(e) does not go to its findings of fact, as to which the "unless clearly erroneous" test applies, but to its application of the legal standards just discussed. See *Mamiye Bros.* v. *Barber S.S. Lines, Inc.*, 360 F.2d 774, 776-78 (2 Cir.), *cert. denied*, 385 U.S. 835 (1966).

We turn now to a consideration of the §14(e) violations charged against each of the defendants.

(b) Piper Family

CCI's charges against the Piper family stem from a series of communications to Piper shareholders in the form of shareholder letters and a press release.

The shareholder letters dated Januury 27 and 28, sent while the CCI tender offer was pending, stated that the Piper Board of Directors had "carefully studied this offer and is convinced that it is inadequate and not in the best interests of Piper's shareholders". It further stated that, if CCI were suddenly willing to offer shareholders $65, it must believe that Piper stock is worth more than it is offering.[15] CCI contends that a reasonable shareholder

15 The letter also stated that Piper was talking to major industrial corporations about combination and that if one could be put through, "[A] higher value could be realized for all shareholders." This was not misleading because Piper officials were trying to find an alternative, such as a merger, that would be better for themselves and Piper shareholders. The letter also urged shareholders to consider "important points" such as the facts that "Piper's sales increased more than 20% in fiscal 1968 over the prior year, and its earnings per share were approximately 29% higher." CCI maintains that they should also have disclosed that sales and earnings for the first quarter of the next

would have assumed that "inadequate" referred to price. At that time Piper stock was selling on the market for considerably less than $65 per share. First Boston in fact had given Piper its opinion that the price offered was "fair and equitable". The Piper corporation itself, acting through the Piper family, at that time was contemplating a large sale of Piper stock to Grumman at the same price.

The district court concluded that "inadequate" referred to factors other than price, such as the quality of Chris-Craft management. We disagree. A reasonable shareholder reading the letter most likely would assume that the reference was to price. Since price usually is what a person contemplating a sale of shares is most concerned with, a prudent shareholder naturally would assume that the Piper family was addressing itself to that consideration in opposing the offer. If the Piper family intended to refer to other factors, it surely would have been more specific. The Piper family's culpability regarding these shareholder letters is clear. Corporate officers and directors in their relations with shareholders owe a high fiduciary duty of honesty and fair dealing. See *Swanson* v. *American Consumer Industries, Inc.*, 415 F.2d 1326 (7 Cir. 1969). By reason of the special relationship between them, shareholders are likely to rely heavily upon the representations of corporate insiders when the shareholders find themselves in the midst of a battle for control. Corporate insiders therefore have a special responsibility to be meticulous and precise in their representations to shareholders. The Piper family obviously disregarded this obligation when they sent out these shareholder letters knowing that they were materially misleading.

fiscal year were down considerably compared to the first quarter of the previous year. We cannot say that, once Piper mentioned sales and earnings figures, it was required to reveal all relevant figures. Nor can we say that the decline was so severe that it made the previous year sales and earnings figures deceptive.

CCI also attacks the press release of January 29 by Piper officials that Grumman had "agreed to purchase" 300,000 shares of Piper at $65 per share. CCI argues that the tentative nature of the January 25 agreement was not adequately disclosed in the release. The agreement permitted Grumman to return the entire 300,000 shares for a refund of its purchase price plus interest within six months. This "put" provision was not disclosed in the press release, although it was described in Piper's application for listing with the NYSE. The release did reveal that the agreement was subject to the approval of the Piper and Grumman boards as well as other conditions. The published list of conditions gave the appearance of being exclusive, thus solidifying the impression that the sale was all but formally completed.

We find no fault in the Piper family's effort to avert through a Grumman merger what they had concluded was an unfavorable takeover by CCI. Such a maneuver is a common response to a takeover attempt. See Schmultz & Kelly, *Cash Take-Over Bids—Defense Tactics*, 23 Bus. Law 115, 132-34 (1967). We also agree with the district court's conclusions that the agreement was not a "sham" and that the "put" was a rational and logical part of the agreement. But Piper's failure to describe the put in its press release, or in its subsequent letter to shareholders, constituted a material omission in violation of §14(e). By failing to disclose this provision, the release portrayed the Grumman agreement as a completed, favorable deal between Piper and Grumman which also was likely to provide a basis for further and more profitable relations between the two companies.[16] The "agreement" actually was

16 This depiction of the agreement was further suggested by a statement in the release that the "purchase provides an opportunity for Grumman and Piper to study the feasibility and advantages of a possible combination of the two companies."

a preliminary and conditional overture directed toward a possible merger. The Piper family recklessly disregarded its obligation to shareholders in failing to disclose with substantial accuracy a transaction which was likely to affect the attitude of Piper shareholders toward the CCI tender offer.

CCI also challenges the shareholder letters with respect to the BPC and CCI exchange offers on the ground that they failed to disclose the Piper family's financial interest in the success of the BPC general exchange offer. Letters dated June 4 and July 25 urged Piper shareholders to accept the BPC exchange offer. A June 20 letter disparaged the CCI exchange offer. All the letters were sent over the signature of W. T. Piper, Jr. None of the letters explained that, under the terms of the May 8 agreement between BPC and the Piper family, the Piper family might profit handsomely from BPC's acquiring a controlling interest in Piper.[17] The agreement provided, as stated above, that, if the value of the securities package traded to the Piper family for their Piper holdings was below $80 per Piper share on the effective date of the general exchange offer, BPC would make up the difference, *if* BPC were successful in obtaining over 50% of the outstanding Piper shares. The Piper family therefore potentially had an interest in the success of the BPC exchange offer. By July 25, they must have realized that this interest amounted to a considerable sum of money.[18] If the letters merely had supplemented the prospectus in providing publicity for the terms of the offer, there might be less basis for concern that the Piper family's self-interest was not disclosed. But the letters are replete with the personal opinions and recommendations of W. T. Piper, Jr. on the quality of the BPC securities and the management of BPC. The July 25 letter, sent after the Piper family must have known what they stood to gain in the event of a successful BPC takeover, stated that "we strongly recommend" the offer and "we have been impressed with the management and operations of Bangor Punta". Under these circumstances, the Piper shareholders were entitled to receive information sufficient to make an informed judgment on the weight to be given the personal recommendations of the Piper family. Cf. *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 197-201 (1963).

We hold that the communications to Piper shareholders in the form of shareholder letters and a press release constituted violations of §14(e) by the Piper family defendants.

(c) BPC And Its Officers

CCI's claims that BPC violated §14(e) arise from public communications and filed materials regarding the BPC general exchange offer. On May 8, Piper and BPC published a press release which stated that BPC had agreed

> "to file a registration statement with the SEC covering a proposed exchange offer for any and all of the remaining outstanding shares of Piper Aircraft for a package of Bangor Punta securities to be valued in the judgment of the First Boston Corporation at not less than $80 per Piper share."

CCI contends that this statement was materially misleading because a reasonable investor would have interpreted the

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17 The preliminary and final prospectus for the BPC general exchange offer disclosed that there had been an exchange offer made to the Piper family and related that under the May 8 agreement the family might gain from the success of the general exchange offer. We do not believe under the circumstances that disclosure in a detailed and extremely complex prospectus, which did not accompany the letters, fulfilled the Piper family's duty to reveal this material fact. Cf. *Mills* v. *Electric Auto-Lite Co.*, 403 F.2d 429, 433 (7 Cir. 1968), *vacated and remanded*, 396 U.S. 375 (1970).

18 One estimate placed the amount at a total of $13 million.

$80 value figure to be a guarantee of market value when the actual market value proved to be considerably less than $80. As stated above, we held in our earlier en banc decision that this statement of value violated §5(c) of the 1933 Act but we made no determination whether the statement also was misleading. 426 F.2d at 573-76. We did observe that a prospectus "would have eliminated the possibility, perhaps the probability, that some persons would have construed the $80 figure as referring to market value when that value was neither accurate nor intended". *Id.* at 575.

The district court concluded that "the language of the May 8 release could not be confused by reasonable men . . . with offers intending or implying guarantees of market value." 337 F.Supp. at 1137 n. 9.[19] We agree. If the release were to be construed as a promise of future value, it would not be as a promise of market value. A reasonably knowledgeable investor is aware that the "value" of a security can refer either to the market or sales price of the security or to its worth as measured by the assets and earnings of the issuing company. The absence of the term "market value" in the release, as well as the fact that the valuation was to be "in the judgment of the First Boston Corporation", would suggest to a prudent investor that "value" here was to be based on an appraisal of assets and earnings.

The statement of value was not a fraud violation for another reason. It was not a material representation. A rational investor considering whether to take advantage of the BPC exchange offer after it became effective would not have been influenced by the earlier promise of value when the actual package had been disclosed to him for scrutiny and value determination. We therefore agree

19 The district court also held that even if a prudent investor might have interpreted "value" to mean market or resale value, the BPC package turned out to be worth $73 to $79, the difference between the promise and performance being "de minimis".

with the district court that the May 8 release has not been shown to have been damaging to CCI.

BPC contends that the district court erred in holding that the BPC registration statement was misleading. The district court, in *SEC* v. *Bangor Punta Corporation,* 331 F.Supp. at 1160-61, held that BPC's failure to disclose the circumstances which made the carrying figure for the Bangor and Aroostook Railroad (BAR) obsolete caused the registration statement to be misleading. BPC carried on its books its holdings in the BAR (98.7%) at $18.4 million. Although this amount was established through questionable accounting techniques, such techniques are not specifically attacked here.[19a] CCI does charge that BPC failed to disclose that it had negotiated for a sale of the BAR at a price substantially below $18.4 million. Some additional facts are necessary to an understanding of this claim.[20]

At the April 1, 1969 BPC board meeting, BPC had considered disposing of the BAR and had appointed a committee headed by Curtis Hutchins to study various methods of disposition. On May 12 and 15, Hutchins met with Frederic Dumaine, Chairman of the Board of Amoskeag, Inc., to discuss the possible sale of the BAR to Amoskeag. On May 12, Dumaine offered $5 million for the BAR. He indicated no preference for buying assets or stock. On May 15, Hutchins provided Dumaine with information on the BAR, such as the railroad's cash flow figures and balance sheet. Dumaine decided that he wanted to buy the stock. Hutchins met with his committee the same day. They agreed that a sale to Dumaine at $5 million would be

19a Among other things, the increase in book value resulting from a revaluation of the BAR was credited directly to earned surplus, thus by-passing the income accounts. This is dubious accounting procedure.

20 A full discussion of the BAR incident is set forth by the district court in *SEC* v. *Bangor Punta Corporation*, 331 F.Supp. at 1156-60.

BPC's best course of action. At a BPC board meeting on May 21, Hutchins reported Dumaine's offer and his committee's recommendation.[21] He did not ask for approval of the sale but only for authority to continue negotiations. Nicolas M. Salgo, BPC's Chairman, suggested selling 51% of the BAR then and 49% later for a total consideration of $7 million. This proposal was rejected by Dumaine when it was later submitted to him. The BPC board resolved to study further the tax and accounting ramifications of the sale. On May 27, Hutchins and Dumaine formulated a letter of understanding concerning the sale. This was not signed by Hutchins. It stated that "you [Dumaine] and I have agreed . . . on the sale" at $5 million, but qualified this by noting that any understanding was subject to BPC board approval. Hutchins repeatedly explained to Dumaine that his authority was limited to exploring possibilities of divestiture and that he did not have the power to make a decision alone. On June 3, Hutchins met with the BPC management. They decided to table the matter while their tax and accounting departments studied the effect of selling assets rather than stock. On June 16, Hutchins informed Dumaine that the board refused to approve the letter of understanding. He further explained that the BPC management considered it essential that the legal and accounting effects of the transaction be studied, and that these investigations probably could not be completed for another two months because other matters (the exchange offer) had priority. Hutchins expressed to Dumaine his personal opinion that a deal would be made. On September 9, the board authorized Hutchins to make the sale to Amoskeag of BAR assets rather than stock, if possible, but basically with freedom to enter into the deal on whatever terms he decided were best. The agreement was entered

21 Hutchins presented three options to the board: sale, merger, or status quo. He and the board rejected the last two options.

into on October 2, 1969. This resulted in BPC sustaining a $13.8 million book loss, thus contributing to an $8,566,964 loss of net income for 1969 and to a reduction in retained earnings from $37.9 million at the end of fiscal 1968 to $20.5 million at the end of 1969.

The district court found that "the Bangor Punta directors could not [at the time of the exchange offer] have believed that the $18.4 million figure . . . any longer represented a responsible appraisal of market value of the BAR holding". 331 F.Supp. at 1161. It concluded that "[c]onsistency of fair disclosure required exposure of circumstances which so clearly rendered obsolete an appraisal made four years earlier". *Id.*

We hold, under the principles enunciated above for determining §14(e) liability, that BPC was required to disclose to Piper shareholders the circumstances surrounding the negotiations for a sale of the BAR, to apprise them with a reasonable degree of accuracy of the seriousness of such negotiations, and to inform them of the basic effect this might have on the operations of BPC. In *SEC* v. *Texas Gulf Sulphur Co., supra*, 401 F.2d at 849, we stated the standard of materiality to be applied where an event has not yet occurred but certain facts are known in advance:

> "[W]hether facts are material . . . when the facts relate to a particular event . . . will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity."

Hutchins and the other special committee members—Robertson, Stone, Siel—were highly knowledgeable about the BAR's affairs. Several had been past presidents of

the BAR and all had managed it in some capacity. These men had decided in May 1969 that a sale to Amoskeag was the only viable alternative. Certainly the BPC board was likely to be strongly influenced by their decision. The board in fact had taken a position favorable to the sale from the beginning and was primarily concerned with getting as much out of the sale as possible. The board knew that a merger of the BAR with another New England railroad was improbable. If they kept it, there would have to be substantial capital outlays of $5 million over the next five years to break even. Under these circumstances, by July the board must have realized that a sale of the BAR at a price substantially below its carrying value would be effected in the near future. A possible loss of $13 million, moreover, would have a sufficiently drastic impact on the financial position of BPC to justify disclosure even if the probability of a sale were less. The district court found that a sale of the BAR at $5 million would eliminate 36% of BPC's retained earnings and 12% of the shareholders' book equity.

In addition to the sales negotiations, there were other circumstances indicating that the book value of the BAR was obsolete and unrealistic. Since 1967, the management of BPC had been trying to dispose of the BAR, originally through a merger with another railroad. They apparently realized that the BAR did not have a promising future. The $5 million offer from Amoskeag was the only realistic offer that BPC had received. This alone demonstrated that the BAR was not worth anything close to $18.4 million. BPC's auditors reported on May 20 that a sale to Amoskeag at that price would be reported as an extraordinary loss of $13.5 million.

On the basis of these facts, the district court concluded that the registration statement was "unintentionally in error" and that the omissions were "mere negligence". It

further concluded that the requisite scienter for a private damage action had not been shown. We disagree.

The district court's findings of fact, supported by substantial evidence, do not warrant the conclusions that BPC's officers had decided to sell the BAR before the exchange offer became effective and had postponed consummation in order to avoid disclosure. Nor does the evidence show that BPC failed to disclose the sales negotiations in bad faith. As we have indicated above, however, intent to defraud is not an indispensable element in a private action for damages under the antifraud provisions of the federal securities laws. *Heit* v. *Weitzen, supra,* 402 F.2d at 913-14. The securities laws impose upon an offeror of an exchange offer a duty to act reasonably in discovering facts material to the offer as of the time of the transaction and in disclosing fully those material facts of which the offeree is presumably unaware and which ostensibly would influence his judgment. *Cf. Kohler* v. *Kohler Co., supra,* 319 F.2d at 642. Corporate officers have a reasonable area of discretion in determining how far to explore the facts and in deciding what facts need to be disclosed. So long as they operate within this area, the securities laws do not impose liability. In order to encourage candor in the securities market, and well informed decisions by investors, this discretion must be exercised with caution.[22]

We believe that the officers of BPC greatly transgressed their allowable area of discretion in not disclosing the BAR negotiations and other circumstances reflecting the value of the BAR. The officials in charge of the exchange offer

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22 We do not hold that a corporation prima facie has acted unreasonably if the omission or misstatement is material. Corporate officials must be allowed considerable room for discretion; otherwise their normal functions as corporate officials will be inhibited. The totality of the facts and circumstances must be examined to determine whether the officials were reckless or grossly negligent.

were well aware of the discussions with Amoskeag and the activities of the special BAR committee. They also were aware of all the other circumstances that indicated that the book value of the BAR was deceptive and unrealistic. Their judgment not to reveal basic information about the then current status of the BAR holdings clearly was unreasonable. They showed reckless disregard for the import of their activities concerning the BAR. They knew that the book value of the BAR set forth in the registration statement was no longer realistic. Considering the totality of the facts and circumstances, they failed to discharge their clear duty of proper disclosure.

We hold that such conduct on the part of BPC and its officers violated §14(e).

(d) First Boston And Its Officers

CCI's claim that First Boston violated §14(e) is based on its conduct in connection with the BPC exchange offer. First Boston was the underwriter and dealer-manager for the exchange offer. As such, it had ready access to the books and records of BPC. It availed itself of this privilege sufficiently to examine the minutes of the BPC board meetings, including those of April 1 and May 21. Representatives of First Boston did not see the letter of understanding between Hutchins and Dumaine. They did question BPC's management regarding the BAR and were informed that there were no plans at the time to dispose of the railroad. That appears to have been the full extent of First Boston's investigation.

The federal securities laws impose upon private parties the primary responsibility for verifying the accuracy and completeness of information provided to potential investors. See H.R. Rep. No. 85, 73rd Cong., 1st Sess. 2-3 (1933). For this reason, Section 11 of the Securities Act

of 1933, 15 U.S.C. §77k (1970), authorizes the purchaser of a security to sue the underwriter and others involved in the issuance of securities, if the registration statement contains a misstatement or misleading omission of material fact. A "due diligence" defense to such a suit is available to all but the issuer. Section 11(b), 15 U.S.C. 77k(b) (1970), provides that a defendant can escape liability if he can prove that:

> "he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading."

Section 11 of course provides a cause of action only for a purchaser of securities issued pursuant to a registration statement. We believe that §14(e) imposes liability upon an underwriter in favor of a competing offeror, specifically where the misrepresentation occurs in the context of a contest for control. An underwriter is liable under §14(e) as an aider and abettor of the issuer if he was aware of a material falsity in the registration statement or was reckless in determining whether material falsity existed. See *SEC* v. *North American Research & Development Corp.*, 424 F.2d 63, 81 (2 Cir. 1970); Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, Contribution*, 120 U. of Pa. L. Rev. 597, 620-46 (1972).

Section 14(e) provides that "[i]t shall be unlawful for any person to *make* any untrue statement of a material fact" or to mislead by omitting "to state any material fact". (Emphasis added). An underwriter or dealer-man-

ager for a securities issue does not actually prepare the registration materials. Thus, in a literal sense, it does not "make" statements to potential investors. But we do not read §14(e) so narrowly. An underwriter by participating in an offering constructively represents that statements made in the registration materials are complete and accurate. The investing public properly relies upon the underwriter to check the accuracy of the statements and the soundness of the offer; when the underwriter does not speak out, the investor reasonably assumes that there are no undisclosed material deficiencies. The representations in the registration statement are those of the underwriter as much as they are those of the issuer.

Self-regulation is the mainspring of the federal securities laws. No greater reliance in our self-regulatory system is placed on any single participant in the issuance of securities than upon the underwriter. He is most heavily relied upon to verify published materials because of his expertise in appraising the securities issue and the issuer, and because of his incentive to do so. He is familiar with the process of investigating the business condition of a company and possesses extensive resources for doing so. Since he often has a financial stake in the issue, he has a special motive thoroughly to investigate the issuer's strengths and weaknesses. Prospective investors look to the underwriter—a fact well known to all concerned and especially to the underwriter—to pass on the soundness of the security and the correctness of the registration statement and prospectus. See generally Note, *Escott* v. *Barchris: "Reasonable Investigation" and Prospectus Liability Under Section 11 of the Securities Act of 1933*, 82 Harv. L. Rev. 908 (1969). The Senate Report that accompanied proposed §14(e) indicates that this degree of involvement by the underwriter in the making or opposing of

a tender offer may subject him to liability if the registration materials are misleading:

> "This provision would affirm the fact that persons *engaged* in making or opposing tender offers or *otherwise seeking to influence* the decision of investors or the outcome of the tender offer are under an obligation to make full disclosure of material information to those with whom they deal". (Emphasis added). S. Rep. No. 510, 90th Cong., 2d Sess. (1968), quoted in U.S. Code Cong. & Admin. News 2811, 2821 (1968).

We turn now to a determination of whether First Boston violated §14(e). Since we already have concluded that the BPC registration statement and prospectus were materially deficient, the remaining issue to be determined is First Boston's culpability. First Boston is a skilled, experienced and well respected dealer-manager and underwriter. It had an obligation with respect to the BPC exchange offer to reach a careful, independent judgment based on facts known to it as to the accuracy of the registration statement. Moreover, if it was aware of facts that strongly suggested, even though they did not conclusively show, that the registration materials were deceptive, it was duty-bound to make a reasonable further investigation.

We hold that First Boston did not adequately perform its duty in these respects. The minutes of the April 1 and May 21 board meetings,[23] which were examined by the

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23 In view of the critical bearing these minutes have upon the issue of First Boston's liability, we set forth the relevant portions.
The minutes of the BPC board meeting of April 1, 1969 included the following reference to the BAR (Appendix 763):

> "ORGANIZATION AND LONG RANGE PLANNING.
>
> Mr. Salgo* stated that he wished to discuss with the Board the general philosophy of the types of business in which Bangor

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* Chairman of the Board.

underwriting department of First Boston, disclosed the early discussions and negotiations concerning the disposition of the BAR. At the April 1 meeting, the board considered disposing of the BAR and appointed a committee to study the alternatives. At the May 21 meeting, a pos-

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Punta should be involved, and also share with the Board some of the thoughts of management in this connection. He stated that there had been under consideration for some time the question of whether minority interests in some of the more attractive operations, such as the Leisure Time and Public Security Groups, should be spun off, but that he, Mr. Robertson and Mr. Wallace are in unanimous agreement that this should not be done. Instead, there have been discussions about the possibility of spinning off, either in whole or in part, those companies where growth is not developing as rapidly as it is throughout the remainder of the Corporation. In particular, he stated that such discussions had centered upon the Process Engineering Group, the Railroad and the Textile Group. In this connection, he pointed out that the Textile Group is a substantial contributor of cash even though it is not in a growth area. Mr. Salgo stated that the earnings of the Process Engineering Group are small and we need to seriously consider whether this group could be sold to another company. With respect to the Railroad, he stated that there is a question as to whether it should eventually go into a larger railroad system.

Mr. Salgo further stated that it would be very helpful if a committee from the Board of Directors could study the possible divestiture of the Bangor and Aroostook Railroad resulting in public ownership of it, either in whole or in part. He asked Mr. Curtis M. Hutchins to serve as Chairman and Messrs. George H. Seal and Robert G. Stone to serve as members of this Committee, with Mr. W. Jerome Strout as an ex-officio member and advisor to the Committee."

The minutes of the BPC board meeting of May 21, 1969 referred to the BAR as follows (Appendix 775-76):

"BANGOR AND AROOSTOOK RAILROAD.

Mr. Curtis M. Hutchins, as Chairman of a special committee appointed by Mr. Salgo at the Board of Directors meeting held April 1, 1969 (Reference: BPC-4-1-69-28), reported that he and Messrs. Robert G. Stone and George H. Seal (members of the special committee) have just completed a study of the situation with respect to the Bangor and Aroostook Railroad and wish to submit to the Board their unanimous report through Mr. Hutchins.

Mr. Hutchins stated that there appears to be three possibilities

sible sale to Amoskeag was discussed extensively. The board showed considerable interest in the sale at the time and gave the impression of strongly favoring it. These minutes, if not sufficient in themselves to lead a reasonable person to believe that the registration statement was misleading, certainly would have impelled a reasonable person

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which could be adopted with respect to the future of the Railroad. Bangor Punta might keep the Railroad as is, merge the Railroad with another railroad if that were possible, or sell the Railroad at the best possible price.

Mr. Hutchins stated that keeping the Railroad is not very appealing. He pointed out that because of the increased use of trucks and the restricted nature of the territory involved, it is doubtful that the traffic on the Railroad will increase. It appears that if the Railroad is to break even over the next five years, it will be necessary to spend substantial amounts of money for new freight cars and other equipment. He also stated that in discussing the situation with Mr. W. Jerome Strout, President of the Railroad, it appears that the amount of money to be expended might be as much as $5,000,000. Under these circumstances, Mr. Hutchins pointed out that it becomes more and more difficult to justify retention of the Railroad.

Mr. Hutchins next discussed the second possibility, that is, consolidating with another railroad. In this connection, he felt that a combination with the Boston & Maine Railroad, if otherwise possible, might result in Bangor Punta's receiving a third to a 40% interest in a new company. The consideration, however, would be in the form of securities rather than cash. Mr. Hutchins did not feel that this would be a palatable solution.

Mr. Hutchins next considered the question of selling the Railroad and to whom it might be sold. He pointed out that neither the Penn Central nor the Norfolk and Western Railroads have any known interest in the Bangor and Aroostook Railroad and a merger with either of these railroads is very unlikely. He stated that the only person whom he knew who might be interested in the Railroad is Mr. F. C. Dumaine, Jr., Chairman of Amoskeag Company. Mr. Hutchins stated that he has had preliminary discussions with Mr. Dumaine who had indicated that he might be willing to pay $5,000,000. in cash, a combination of cash and Bangor Punta securities, or Bangor Punta securities for the stock of the Bangor and Aroostook Railroad owned by the Corporation. At this point, Mr. Salgo asked whether it might be wise to offer to Mr. Dumaine 51% of the stock of the Bangor and Aroostook Railroad at book value, with an option to purchase the remaining 49% at a higher

to explore further. The only additional investigation by First Boston was to question company officials about the possible sale of the BAR. First Boston did not seek verification of the officials' answer that a sale was not anticipated at that time. Cf. *Escott* v. *Barchris*, 283 F.Supp. 643, 697 (S.D.N.Y. 1968, McLean, D.J.).[24] It did not make a more careful search of BPC's records, nor did it talk to officials

price, with a total consideration, therefore, of approximately $7,000,000.

(At this point, Mr. Flick was called away from the meeting and Mr. Wallace acted as Secretary for the remainder of the meeting.)

Mr. Hutchins stated that, in his opinion, Mr. Dumaine would not agree to a price of $7,000,000., but that he probably would be able to obtain the approval of the Board of Directors of Amoskeag Company at a price of $5,000,000.

Mr. Hutchins stated that he is not asking for an approval by the Corporation's Board of Directors at this time, but only the authority to continue discussions with Mr. Dumaine. He stated that he wishes to first ascertain whether Amoskeag Company is willing to submit a definitive proposal.

Mr. Salgo next suggested that he would like to have Mr. Dumaine transfer to the Corporation 22,500 shares of Bangor Punta $1.25 Convertible Preference Stock as consideration for an option on 51% of the Railroad, the option to be for sixty days with the provision that the stock would be forfeited if the option is not exercised. In discussing Mr. Salgo's proposal, Mr. Strout pointed out that Mr. Dumaine also wishes to enter into an arrangement with the Maine Central Railroad; he does not believe the Maine Central Railroad will agree if such an agreement existed between Amoskeag Company and Bangor Punta Corporation.

After considerable discussion, it was the consensus of the Board that Mr. Hutchins should attempt to negotiate on the 49/51% basis suggested by Mr. Salgo, but that he has the authority to negotiate on the basis of a sale of 100% of the Bangor and Aroostook Railroad subject to further investigation of accounting and tax ramifications of such a transaction and approval by the Board of Directors or the Executive Committee of the Board of Directors."

24 The standard of reasonableness under §11 of the 1933 Act is that of "a prudent man in the management of his own property". 15 U.S.C. §77k(c)(1970). It is unnecessary for us to decide whether a reasonableness standard should be imposed under §14(e) since First Boston's conduct, in our view, went far beyond mere negligence.

at Amoskeag after it discovered from the minutes that Amoskeag was the likely buyer. Under these circumstances, First Boston's certification of the BPC registration statement carrying the BAR at $18.4 million amounted to an almost complete abdication of its responsibility to potential investors, to CCI, and to others who relied upon it to detect misrepresentations. We hold that First Boston possessed enough information reasonably to deduce that the BPC registration statement was materially inaccurate.

We hold that the conduct on the part of First Boston and its officers violated §14(e).[25]

(3) *Causation*

One of the fundamental issues upon which we disagree with the district court is that of causation.

The district court correctly pointed out that CCI neither bought nor sold Piper stock on the basis of the communications from the Piper management, the May 8 press release or the BPC registration statement. The court concluded that CCI was seeking damages as a "defeated contender for control" without showing that "a single exchanging Piper shareholder would have refrained from the exchange *and* taken an offer for his shares from Chris-Craft instead of that from Bangor Punta". 337 F.Supp. at 1139. (emphasis that of district court). We hold that the district court applied inappropriate causation principles and erred in assessing the nature of CCI's complaint.

25 We agree with the district court that there is no merit to CCI's other claims against First Boston, essentially that it was the chief strategist for Piper and BPC in the control battle. The district court found, based on substantial evidence, that in its capacity as investment banker First Boston merely provided professional services to these companies. The business decisions that led to violations of the securities laws were initiated by these companies, not by First Boston in its role as investment banker. We are aware of no authority for holding First Boston liable in that capacity.

We agree with the district court's findings that CCI failed to show with reasonable certainty that it would have obtained a controlling position in Piper had it not been for the violations of the securities laws by BPC and First Boston. On the other hand, it is equally clear that BPC itself obtained control through its violations of the securities laws.

Since failure to disclose the BAR negotiations was a material omission, the next question is whether such omission was relied upon. It is important to note that, since the harmful effect of the negligence in this case did not depend upon the exercise of volition by CCI, but instead upon the exercise of volition by other persons, CCI need not show that it relied upon the deception. CCI must show that there was a misrepresentation upon which the target corporation stockholders relied and that this was in fact the cause of CCI's injury. See *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627, 635 (2 Cir.), *cert. denied*, 389 U.S. 970 (1967).

We have held that reliance is established in a Rule 10b-5 action if the " 'misrepresentation is a substantial factor in determining the course of conduct which results in [the recipient's] loss' ". *List* v. *Fashion Park, Inc.*, 340 F.2d 457, 462 (2 Cir.), *cert. denied*, 382 U.S. 811 (1965). In many instances, courts have applied a subjective test to the reliance requirements, considering such factors as the plaintiff's general business expertise, *Clement A. Evans & Co.* v. *McAlpine*, 434 F.2d 100, 104 (5 Cir. 1970), his familiarity with the affairs of the corporation, *Kohler* v. *Kohler Co.*, 319 F.2d 634, 641-42 (7 Cir. 1963), and his access to the information misrepresented, *Hafner* v. *Forest Laboratories, Inc.*, 345 F.2d 167, 168 (2 Cir. 1965). See generally Note, *Reliance Under Rule 10b-5: Is the "Reasonable Investor" Reasonable?*, 72 Colum. L. Rev. 562 (1972).

Where the transaction is accomplished through impersonal dealings, such as on a stock exchange, or for some other reason the factors that influenced the parties are not readily apparent, the decisions have discussed liability in terms of the "materiality" of the misrepresentation. See *Heit* v. *Weitzen*, 402 F.2d 909, 913 (2 Cir. 1968), *cert. denied*, 395 U.S. 903 (1969); *List* v. *Fashion Park, Inc.*, *supra*, 340 F.2d at 462-64; *Kahan* v. *Rosenstiel*, 424 F.2d 161, 173-74 (3 Cir. 1970). This constructive reliance principle is particularly appropriate in class actions where proof of actual reliance by numerous class members would be impracticable. *Kahan* v. *Rosenstiel*, *supra*.

The Supreme Court adopted this principle in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). *Mills* was a class action brought by shareholders under §14(a) of the 1934 Act, 15 U.S.C. §78n(a) (1970), complaining that proxy solicitation material recommending a merger failed to disclose a conflict of interest. The proxy contest was won by the alleged wrongdoers and they needed the votes of minority shareholders to achieve the victory. The Court, in an opinion by Mr. Justice Harlan, stated the causation principle to be applied:

> "Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction." 396 U.S. at 385.

The Court established a presumption of reasonable reliance in order to avoid an overly difficult burden of proof. This was to encourage the vigorous enforcement of the securities laws through shareholder suits, and to effectuate the con-

gressional purpose of enabling shareholders to make informed decisions "by resolving doubts in favor of those the statute is designed to protect". *Id.*

The Supreme Court recently held that the *Mills* principle is applicable to a Rule 10b-5 damage action. *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972). In *Ute*, members of a large class of security holders had been influenced to sell because of a failure to disclose. The Court held:

> "Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision . . . . This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact." 406 U.S. at 153-54.

Accord, *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255, 288-91 (3 Cir. 1972).

The district court below acknowledged that in "a proper case" the *Mills* test is sound, but concluded that this was not an appropriate case. It also held that §14(e) does not in any way alter the result. 337 F.Supp. 1139-40. We disagree.

The *Mills-Ute* test may be appropriately invoked, as here, in the context of a suit under §14(e) by an offeror against the target corporation and its allies. In such an action, the claim, as here, usually will be that the offeror's opponents have defeated him or impaired his efforts by misleading the target shareholders. *H.K. Porter Co.* v. *Nicholson File Co., supra,* 4 CCH Fed.Sec.L.Rep. at 93,080-81. Concentration upon such shareholders often is the primary means of defeating the tender offer. Since the

offeror usually is a sophisticated businessman, his opponents rarely will be able to deceive him directly. As we said in *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787, 796 (2 Cir. 1969), *cert. denied*, 400 U.S. 822 (1970):

> "When [the offeror] entered the securities market with its tender offer, it was entitled to the Act's protection not only against being deceived itself but also against deception of the investing public designed to prevent the public from entering into securities transactions." [26]

In the instant case, the offeror was not directly deceived but it was directly injured by defendants' deception of the Piper shareholders.

The fact that CCI was not directly deceived is what makes application of the *Mills-Ute* test appropriate and essential. It would be unduly burdensome to require an offeror to prove actual reliance when, as here, there are numerous shareholders who undoubtedly possess a wide range of expertise and knowledge. It would be impractical to require CCI to prove that each individual Piper shareholder who failed to trade for CCI's stock, or who traded for BPC's stock, relied upon defendants' misrepresentations in doing so. These impracticalities are avoided by establishing a presumption of reliance where it is logical to presume that reliance in fact existed. *Kohn* v. *American Metal Climax, Inc., supra,* 458 F.2d at 288-91. As we have stated above, §14(e) was designed to protect offerors from

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26 In *Crane*, the offeror, Crane, made a tender offer for stock in Air Brake, but was thwarted when an ally of Air Brake, Standard, made heavy market purchases in Air Brake so as to manipulate its price. We held that Crane was entitled to specified relief under Rule 10b-5 even though it had not established that its tender offer would have been more generally accepted if these violations had not been committed. The district court in the instant case distinguished Crane as a decision where the "character of the violation and the clear causal nexus were crucial to the . . . result". 337 F.Supp. at 1140. We do not read *Crane* in such a restricted fashion.

unfair and unlawful opposition. By "resolving doubts in favor of those the statute is designed to protect", *Mills* v. *Electric Auto-Lite Co., supra,* 396 U.S. at 385, we are implementing congressional intent not only to protect investors, but to make sure that contests for control between offerors and incumbent management, or other offerors, shall proceed fairly.

In applying the *Mills-Ute* test to the instant action, we presume that the Piper shareholders would not have accepted the BPC exchange offer but for the misrepresentations to which we have referred above. Even if we assume arguendo that BPC's offer was superior to that of CCI, taking into account the BAR loss, we still must conclude that BPC's success was unlawfully attained. Piper shareholders had a third option, i.e. to hold their shares, which presumably they would have chosen if all the material facts had been disclosed. Under the *Mills-Ute* test, we must presume that BPC's offer was not so appealing, considering the BAR loss, as to have attracted any takers. See *Vine* v. *Beneficial Finance Co., supra,* 374 F.2d at 635. Since BPC eventually acquired only about 51% of the outstanding Piper shares, it is clear that the 7% acquired through its exchange offer was critical to its success. Reliance and causation have been shown.

What the securities law violations caused was a denial to CCI of a fair opportunity to compete for control of Piper. The specific injury sustained was a reduction in the value of CCI's Piper holdings upon BPC's unfairly obtaining control. CCI spent large sums of money in actively seeking control. Its purchases were made in the reasonable belief that its opponents would battle hard but within the law. CCI is entitled to compensatory damages for the decline in the value of the minority shareholder's interest with which it became encumbered as a result of competing against those who violated the securities laws.

Even if CCI had discovered, prior to purchasing some of the shares that it now holds, that BPC was competing unfairly, it was not required to mitigate damages by dropping out of the contest. A victim of a securities fraud does not have to elect between pursuing his goal in spite of the unlawful tactics of his opponents and recovery of damages for injuries sustained. Indeed, if CCI's persistence in the fight despite the violations had brought it victory, it would not have sustained damages from being put in a minority shareholder's position.

The Piper family's violations also caused injury to CCI. Piper contends that since CCI was not able and willing to accept any more shares than it did accept as a result of the cash tender offer, the January letters to shareholders and the Grumman press release were harmless. The evidence does not support this contention.

Since CCI had decided by the time of the cash tender offer that its objective was to win control of Piper, it clearly was willing to accept as many shares as it could obtain. While it was ready to commit itself to purchase only 300,000 shares, that limitation does not indicate that it would not accept a substantial number of additional shares if tendered.[27] Indeed, it expressly reserved the right to purchase more than the 300,000 shares.[27a] And although Piper offered some evidence indicating that CCI might have trouble

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27 Mr. Gordon testified, when asked why CCI had committed itself to purchase no more than 300,000 shares, that one reason was that "[w]e did not want . . . Piper to emphasize the fact that the financing for the shares beyond 300,000 had not yet been arranged—to emphasize that successfully, because we knew we could arrange it, but we didn't have it at that time."

27a Officers of CCI announced to the press that the tender offer was successful. The Piper family would have us construe this announcement as a concession that CCI did not expect or desire more from its cash tender offer. As is well known, such statements in this context often are made for the sake of appearance. We decline to ascribe to them the interpretation suggested by the Piper family.

financing additional purchases, it appears that such financing was available. Mr. Gordon testified that, before the cash tender offer had expired, he had arranged with Burnham & Co. to borrow up to $22,000,000 if needed to purchase shares in excess of 300,000. Moreover, the fact that CCI bought only a few shares of Piper on the market after the termination of its cash tender offer is of little probative value. There are many possible explanations for this consistent with CCI's position that it would have purchased additional shares pursuant to the cash tender offer. For example, CCI might have been avoiding the expense of searching out small blocks of shares and the high transactional costs involved in purchasing them. We are satisfied that CCI had a desire to purchase, and was capable of purchasing, a substantial number of additional shares pursuant to its tender offer.

The January letters to shareholders and the Grumman press release misled the Piper shareholders into believing that CCI's tender offer was undesirable. CCI's tender offer could be fruitful only if Piper shareholders believed that the price was currently a fair one and would remain so for at least a reasonable period in the future. The fairness of the offer is demonstrated by the fact that, despite the misrepresentations of the Piper family, over 300,000 shares were tendered. Considering the soundness of the offer and the materiality of the Piper family's deceptions, it is a reasonable presumption that CCI was unlawfully denied the opportunity to purchase additional shares. See *Crane Co.* v. *Westinghouse Air Brake Co., supra*, 419 F.2d at 797. Moreover, these misleading statements most likely had a continuing adverse effect on CCI's attempts to acquire Piper shares. When Piper shareholders were deciding whether or not to accept CCI's exchange offer, many undoubtedly remembered and were influenced by the Piper

family's misleading January statements portraying CCI as a company that made inadequate and unfair offers.

We hold that, considering the narrow margin of victory here, the Piper family's misstatements and omissions in the January shareholder letters and the Grumman press release denied to CCI a fair opportunity to win the contest for control.

The June and July letters to Piper shareholders are a different matter. Although they omitted any reference to the arrangement between the Piper family and BPC whereby the family might gain a considerable amount of money if BPC were to be successful in gaining control of Piper, CCI protected itself against injury from such omission by sending letters to all Piper shareholders on June 16 exposing this non-disclosure by the Piper family. The nature of the Piper family's personal stake in the exchange offer was fully described. We therefore conclude that this omission was rendered harmless.

We hold that the record establishes that the injuries sustained by CCI were caused by the violations of the securities laws by BPC and its named officers, First Boston and its named officers and members of the Piper family.

(C) Violations of Rule 10b-6 Under 1934 Act

We turn now to CCI's claim that BPC's cash purchases between May 14 and 23 of three large blocks of Piper stock violated Rule 10b-6 under the 1934 Act, 17 C.F.R. §240.10b-6 (1972), and that such purchases caused injury to CCI. We hold that they did.

Rule 10b-6 prohibits bids for or purchases of a security by or on behalf of the issuer of a security if the security is "the subject of . . . [a] distribution". Included within the prohibition are bids for or purchases of "any right to purchase any such security". Clearly here, Piper stock, within the meaning of Rule 10b-6, was a "right to purchase" BPC stock.

On May 14, BPC purchased 78,600 Piper shares from Fund of Funds Proprietary Fund, Ltd. (FOF). On May 15, it purchased an additional 20,000 Piper shares from American Securities Corporation. And between May 16 and 23, it purchased an additional 21,600 Piper shares from Bay Securities Corporation. Thus, during this 10 day period and while its exchange offer for Piper shares was pending, BPC made three block purchases of Piper stock totalling 120,200 shares.

In our earlier en banc decision, we held that these purchases fell within the prohibition of the first sentence of Rule 10b-6. *Chris-Craft Industries, Inc.* v. *Bangor Punta Corp.*, 426 F.2d 569, 576-77 (2 Cir. 1970). Our reasoning was that such large purchases by BPC had a tendency to boost the market value of Piper stock to an artificial level. Since the purchases were made shortly after BPC announced on May 8 that it would make an exchange offer, reasonable investors were likely to have attributed the increase in the price of Piper stock to the soundness of BPC's exchange offer. As a result, the operation of the market would tend to raise the market price of the BPC package to align it with the inflated Piper price. Rule 10b-6 was designed to prevent such manipulation of a security which is "the subject of . . . [a] distribution". See *SEC* v. *Scott Taylor & Co.*, 183 F.Supp. 904, 907 (S.D.N.Y. 1959). We therefore concluded that Rule 10b-6 had been violated but we remanded for a determination of whether the exemption contained in Rule 10b-6(a)(3)(2) was applicable and what remedy, if any, was appropriate. 426 F.2d at 577.

On remand, BPC claimed the applicability of the exemption only with respect to its purchase from FOF on May 14. The district court held that "[a] literal reading of the exemption requires a finding that the [FOF] purchase,

like the others, was not exempted". 337 F.Supp. at 1141. BPC does not contest this holding. The court concluded, however, that these were "technical violation[s]" and that there was not enough substance to them to support a finding that CCI was damaged. *Id.* at 1141-43. We disagree.

Since the violations constituted a manipulation of the price of BPC, the question arises whether CCI is a proper party to sue on this claim since it did not accept the BPC exchange offer.[28] CCI's contention is not that it was misled by BPC's purchases of Piper stock. It does contend that Piper shareholders were misled into accepting the BPC exchange offer because the Rule 10b-6 violations had a tendency to inflate the market value, and that CCI, as BPC's rival for the Piper stock, was thereby injured. Cf. *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627, 635 (2 Cir.), *cert. denied*, 389 U.S. 970 (1967). The SEC's policy statement of May 5 announced that purchases of stock of a target company during the pendency of an exchange offer are forbidden by Rule 10b-6 in order to promote fairness in contests for control. We find nothing in the language or history of Rule 10b-6 to suggest that only purchasers of the manipulated stock are entitled to bring an action.[29] We hold that CCI has a right of action to complain that BPC's Rule 10b-6 violation caused it injury.

The remaining question is whether BPC's cash purchases misled the Piper shareholders by artificially boosting the market value of the BPC securities and, if so, whether this deception was in fact the cause of the injury for which CCI seeks redress. The district court held that, although the

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28 The district court held that CCI had standing to sue on the Rule 10b-6 violation. 337 F.Supp. at 1133.

29 Rule 10b-6 does not contain the clause, "in connection with the purchase or sale of any security", which limits a cause of action under Rule 10b-5. *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2 Cir.), *cert. denied*, 343 U.S. 956 (1952).

purchases were literally proscribed by Rule 10b-6, Piper shareholders were not necessarily misled because, among other reasons, the purchases were not designed to produce a stimulating effect, were not radiated into the general market, and were not made through an exchange or regular broker-dealer. 337 F.Supp. at 1142-43. We hold that, since the purchases were in violation of Rule 10b-6 and were not exempt, CCI is entitled to recover damages from BPC based on such violations.

Either the purchases were prohibited by the Rule or they were not. If they were, as we have held, then presumptively a stimulating effect was produced which misled the public. Rule 10b-6 was drafted by the SEC on the basis of its considerable expertise and familiarity with market factors. It determined that a purchase that meets all the criteria set forth in the Rule will have a false prodding effect on the price of the distributed security and therefore should be outlawed. On the basis of the facts presented here, we refuse to second guess the wisdom and rationale of the Rule. Cf. *H. Kook & Co.* v. *Scheinman, Hochstin & Trotta, Inc.*, 414 F.2d 93, 98 (2 Cir. 1969). Piper shareholders presumptively were deceived by a material alteration in the value of the exchange package. They no doubt were influenced by this deception to take advantage of what seemed to be a highly favorable BPC exchange offer.[30]

BPC's unlawful conduct denied CCI a fair chance to compete for control of Piper. We cannot say that CCI would have obtained a majority of Piper stock had BPC not violated the law, but it is a fact that BPC obtained control through its unlawful acts. Its May purchases of large

30 CCI need not prove actual reliance by Piper shareholders. Rule 10b-6 creates a presumption that illegal purchases will substantially inflate the price of the security. A reasonable investor is likely to rely on this inflation in deciding to accept the exchange offer. See *Mills* v. *Electric Auto-Lite Co.*, *supra*, 396 U.S. at 385; *Affiliated Ute Citizens* v. *United States*, *supra*, 406 U.S. at 153-54.

blocks of Piper stock operated in the market to make BPC's exchange offer deceptively attractive. Success on that offer was necessary to achieve control. More important, the unlawful purchases themselves constituted about 7% of the outstanding shares of Piper. BPC eventually acquired only 51%. Even arithmetically, it is apparent that the block purchases in violation of Rule 10b-6 were essential to achieve control. BPC's attainment of a majority position has caused CCI to suffer a decline in the value of its Piper holdings.

We hold that CCI is entitled to recover damages from BPC based on its violations of Rule 10b-6.

(D) Relief To Be Granted For Violations of Section 14(e) and Rule 10b-6

Having held that all defendants violated Section 14(e) and that BPC violated Rule 10b-6, we turn now to the form of relief to which CCI is entitled.

Normally, the form of appropriate relief should be left for determination by the district court upon remand, as was done after consummation of mergers achieved as a result of securities laws violations in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 386-89 (1970); *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 433-35 (1964); *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787, 803-04 (2 Cir. 1969), *cert. denied*, 400 U.S. 822 (1970).

In the instant case, however, we believe that it is incumbent upon us to provide specific guidance to the district court as to the form of relief to be granted upon remand. There are several reasons for this. First, as indicated above, the district court did not reach the issue of relief to be granted, since it held that most of the alleged securities laws violations had not been proven, that those proven had not caused injury to CCI and that CCI had failed to prove its claim for damages. Second, under the

posture of the case in the district court, CCI limited its claim for relief to damages, but on appeal has pressed its claim for equitable relief as well as damages. Third, this litigation has been under way for more than three years, with one appeal already having been decided en banc by our Court. And, finally, certain of the questions presented are of first impression, chiefly the application of the anti-fraud provisions of the federal securities laws to a contest for acquisition of a controlling stock interest in a target corporation.

In short, the district court deserves guidance from this Court on the form of relief to be granted. We therefore order, upon remand and after appropriate opportunity has been afforded to the parties to be heard on the issue of relief, that the district court should grant at least the following relief:

(1) *Damages*

Piper has come under the dominance of BPC, with many of its management positions being assumed by BPC officers. It has been operated that way for two or three years. Divestiture of the ill-gotten shares would not be appropriate under the circumstances of this case because it would be difficult to administer and would unnecessarily reopen the control battle. CCI understandably no longer desires to take control of a company that has been substantially changed. It seeks damages.

We have held that the unlawful conduct of the Piper family,[31] of BPC and its named officers, and of First Boston

31 The Piper Aircraft Corporation itself was not a perpetrator of the violations of the securities laws. The evidence shows that members of the Piper family acted not on behalf of the corporation in committing their illegal acts, but in their own individual interests. The district court correctly characterized Piper as "the prize in the battle, not a contender". 337 F.Supp. at 1146. We agree that no liability is to be imposed on the Piper Aircraft Corporation.

and its named officers has caused financial loss to CCI for which it should be compensated. The measure of damages should be the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority position and reducing CCI to a minority position, and thus being able to compel a merger at any time. Since the conduct of each of the defendants, through their violations of the securities laws, contributed to the success of BPC's takeover attempt, a judgment should be entered assessing damages against all defendants jointly and severally. See Section 18(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78r(b) (1970).

(2) *Equitable Relief*

We further hold that BPC should be denied the fruits of obtaining Piper shares illegally. We therefore direct that the district court include in its judgment an injunctive provision barring BPC from voting for a period of at least 5 years the Piper shares it obtained through the unlawful May cash purchases and those it obtained through its exchange offer.[32]

While we believe that the foregoing relief should be sufficient, our direction that the two provisions indicated above should be included in the judgment to be entered on remand is not intended to foreclose the district court from fashioning such additional appropriate relief as it may find necessary to implement our decision herein, after affording the parties an opportunity to be heard on the issue of relief.

The judgment of the district court on the appeal in No. 72-1064 is reversed and the case is remanded.

32 This injunctive provision of course would not apply to those Piper shares which are retransferred to former Piper shareholders who take advantage of the rescission order referred to below.

III.

BANGOR PUNTA CORPORATION v. CHRIS-CRAFT INDUSTRIES, INC. (NO. 72-1120)

In this second of three related appeals, BPC appeals from the district court's dismissal after trial, 337 F.Supp. 1147 (S.D.N.Y. 1971), of BPC's complaint which sought damages from CCI for alleged violations of the securities laws during the contest for control of Piper, BPC's principal claim being that, because of CCI's wrongful acts, BPC paid more than it otherwise would have paid to acquire control of Piper.

The complaint alleged violations of various provisions of the securities laws, including violations of Sections 9(a)(2) and 10(b) of the 1934 Act, 15 U.S.C. §§78i(a) and 78j(b) (1970); of Rules 10b-5 and 10b-6 promulgated under the 1934 Act, 17 C.F.R. §§240.10b-5 and 240.10b-6 (1972); and of Section 17(a) of the Investment Company Act of 1940, 15 U.S.C. §80a-17(a) (1970).

At the trial before Judge Pollack, BPC adduced no proof specifically as plaintiff in the instant case, but instead relied on the record in *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corporation, et al.* (No. 72-1064). After trial, the district court dismissed the complaint essentially on the grounds that the winner in a contest for control is not entitled to seek damages against the loser for alleged violations of the securities laws, that whatever BPC paid for control was attributable not to any alleged securities law violations by CCI but to BPC's own determination to obtain control, and that BPC had not supported with credible evidence its contentions that CCI had violated the securities laws or that such violations had caused injury to BPC.

Since we affirm the district court's dismissal of the complaint on the ground that BPC failed to adduce sufficient evidence to prove that the securities laws were violated, we do not reach the question whether BPC's allegations state a claim for relief under Rule 10b-5.

(A) Claim of Manipulation of Prices of CCI Stock

The gravamen of BPC's claim is that CCI violated the securities laws in an attempt to gain control of Piper, and that these violations caused BPC to pay more for Piper stock than it otherwise would have been required to pay. BPC's prime contention is that CCI acted in concert with others unlawfully to inflate the market price of CCI stock at the time of CCI's exchange offer so that the offer would be deceptively attractive. This alleged inflation of CCI's price is said to have had the secondary effect of driving up the price of Piper stock.

To prove such price manipulation, BPC relies upon inferences from a series of events. The relevant occurrences began in 1968 when Roger Spencer, a vice-president of Mitchell, Hutchins & Co., Inc. (a brokerage firm with close ties to several mutual funds), took an interest in CCI as a possible investment for Mitchell, Hutchins' clients. Spencer conducted an investigation of CCI that included several conversations with Herbert Siegel, President of CCI. Spencer subsequently recommended to several of his clients that CCI would be a sound investment. Several of these funds—Technology Fund, Inc. (Tech Fund), Investors Diversified Services, Inc. (IDS), Newton Fund, Inc. and Commonwealth Edison Pension Fund, Inc.—eventually were involved in the purchase of CCI stock.

IDS is a manager of a complex of mutual funds. Two of its managed funds, Investors Mutual, Inc. and Investors Stock, Inc., purchased 28,300 shares of ICC common in the period January 14-23, 1969. Another purchase of 53,900

shares was made on January 24 and 25. By January 31, the two funds had acquired 94,600 common and 24,700 of $1.40 preferred; another IDS fund had purchased 9000 common.

Tech Fund, a registered investment company, not only purchased many shares of CCI stock, but also, as discussed above in our opinion in No. 72-1064, sold 101,100 shares of Piper to CCI on January 22 at $65 per share. On the same day that the Piper sale was completed, Tech Fund apparently decided to acquire 50,000 shares of CCI common and 10,000 shares of CCI preferred. These purchases were made between January 23 and February 25.

About this time, several other organizations also began making purchases of CCI stock in large amounts. American Investors Fund, Inc. (AIF) bought 22,500 common and $78,000 of 6% convertible debentures on four trading days beginning February 7. Keystone Custodian Services, Inc. (Keystone), fund managers, recommended that its Polaris and S-4 Funds buy CCI stock. The two funds purchased 130,000 shares of CCI common between January 20 and April 28. Between January 14 and February 25, these four organizations acquired 17% of CCI's outstanding common stock. These large purchases significantly contributed to a rise in the price of CCI common from 40 on January 13 to 58¼ on February 11, an increase of 45% over the average price during the preceding six weeks.

BPC maintains that these heavy market purchases by the funds were instigated by CCI through agreements and by providing inside information abouts its bids for Piper. Mitchell, Hutchins allegedly was the intermediary in this scheme. BPC's evidence of "agreements" clearly is insufficient. It contends that Tech Fund agreed to purchase CCI stock in return for CCI's buying Tech Fund's Piper holdings at a "premium price". This is pure surmise. There is no evidence of an actual agreement to that effect or that

the parties even discussed such an agreement. The price paid for the Piper stock, $65, was not a "premium" price since the next day CCI announced a large cash tender offer at the same price. IDS allegedly made purchases because it was a principal holder of CCI senior notes and therefore had an interest in the success of CCI's takeover attempt. This interest is not sufficient proof that IDS wilfully manipulated the price of CCI stock.

BPC also has failed to show that CCI gave illegal insider tips to spur market purchases of its stock. CCI did make known that it was planning to make acquisitions in the leisure-time field but this was a well publicized intention.[33] Indeed, most of the funds' purchases were made after CCI announced its tender offer. Any well informed investor by then would have known CCI's plans. It is evident that the funds purchased CCI heavily because their customary sources of information, such as Mitchell, Hutchins, revealed that CCI's acquisition of a company such as Piper probably would increase the value of CCI stock. It was a reasonable investment decision on their part, induced not by a desire to inflate artificially the value of CCI stock but by the prospect of gain. As we indicate below, these investments proved to be ill-advised and of little benefit to CCI or the funds. We cannot conclude on the basis of such evidence that the district court's findings were clearly erroneous.

BPC further contends that a manipulative intent is shown by the timing of the funds in disposing of their CCI holdings. CCI stock decreased in value substantially in the spring and summer of 1969, along with the general market decline. One of the three IDS funds sold its entire

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33 As we stated above in our opinion in No. 72-1064, CCI had sought financing in late 1968 by selling $26 million in debentures for the express purpose of making acquisitions in the leisure-time field. CCI also had made substantial investments in Warner Bros. and Harley-Davidson before purchasing Piper shares.

9000 shares in March because of CCI's difficulties with the Piper takeover. The other two IDS funds retained their CCI investments and sustained book losses of more than $4,600,000. Tech Fund, after selling 1600 of its shares on March 28, decided on April 1 to sell out its entire position. It accomplished this total disposal by selling gradually through July 7. It sustained a $691,000 loss on an investment of $3 million. AIF sold out completely between April 30 and May 20. The Keystone funds retained their holdings until August 1 and disposed of their entire position within the month, incurring a $3,625,048 loss on a $6,447,579 investment. These funds sustained a total loss of about $9,000,000 on their investments in CCI.

BPC argues that the funds did not immediately dispose of their CCI stock in a declining market because they intended to keep CCI's stock prices at an unlawfully inflated level. There is no discernible pattern in the sales that supports such a conclusion. It may be that one of the considerations which influenced the decisions of these investors was concern for the success of CCI's exchange offer. But, even if so, the record does not establish that it was the sole or even dominant consideration. It is apparent that each investor took the course of action that it believed would minimize its losses. Some were erroneously optimistic and anticipated that CCI would be successful in its quest for control of Piper. But most sold out early. A major portion of the shares was sold before and during the CCI exchange offer, thus impairing rather than promoting its success. We conclude that the district court was not clearly erroneous in refusing to find either a scheme to boost the price of CCI stock or a purpose on the part of CCI and the funds to manipulate the market in CCI shares.

Moreover, the facts as found by the district court, which are based on substantial evidence, do not establish that an unlawful market manipulation occurred. BPC's reliance

upon *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2 Cir. 1969), *cert. denied*, 400 U.S. 822 (1970), is misplaced. There, Crane sought to take over Air Brake by a cash tender offer. Air Brake enlisted the aid of Standard to oppose the takeover. One of the means selected by Standard to achieve this objective was manipulation of Air Brake stock. On the last effective date of the tender offer, Standard, through a series of transactions, purchased on the market an extremely large number of shares at a price above the then market price, while at the same time secretly arranging for others to purchase at a much lower price many of the shares it had acquired. It was manifest from the secret deals and the intentional loss taken by Standard that it deliberately maneuvered the market price of Air Brake stock in order to defeat Crane's tender offer.

In the instant case, unlike *Crane*, the requisite purpose and wilfullness for a market manipulation claim cannot be inferred from the established facts. BPC places unwarranted reliance on circumstantial evidence. The funds bought CCI shares because they believed that it was a wise investment. The securities laws do not proscribe all buying or selling which tends to raise or lower the price of a security. The securities laws are designed to create "investors markets where prices may be established by the free and honest balancing of investment demand with investment supply." H.R. Rep. No. 1383, 73 Cong., 2d Sess. 11 (1934). So long as the investor's motive in buying or selling a security is not to create an artificial demand for, or supply of, the security, illegal market manipulation is not established. See Section 9(a)(2) of the 1934 Act, 15 U.S.C. §78i(a)(1970).

We hold that BPC failed to prove that the funds acted from improper motive, that CCI encouraged them to do so or that unlawful market manipulation in fact occurred.

(B) Claim of Illegal Warehousing

BPC claims that, at the direction of CCI, Tech Fund instructed its affiliates to purchase and illegally "warehouse" Piper stock which these affiliates later tendered to CCI.

BPC bases this claim on the following facts. After CCI announced its exchange offer, it continued to purchase Piper shares on the market. On April 7, the SEC warned CCI that these purchases violated Rule 10b-6. CCI heeded this warning and ceased making purchases. On April 17 and 18, Tech Fund ordered two of its affiliates to start buying Piper stock. They acquired 14,700 shares by April 25. Of this total, 9,900 shares were tendered on June 5 to CCI pursuant to its exchange offer.

BPC argues that Tech Fund purchased these securities at the encouragement of Spencer of Mitchell, Hutchins, who supposedly acted under instructions from CCI. Tech Fund evidently did purchase the stocks because it hoped to take advantage of a favorable CCI exchange offer. Tech Fund also apparently relied at least in part upon the representations of Spencer. The record, however, does not support BPC's assertion that CCI arranged this purchase by Tech Fund or that it made promises of value to Tech Fund with regard to its exchange offer.

We hold that the district court was not clearly erroneous in rejecting BPC's claim of illegal warehousing.

We have considered BPC's other claims on this appeal, such as CCI's alleged violation of Section 17(a)(2) of the Investment Company Act of 1940, 15 U.S.C. §80a-17(a)(2)(1970), and have concluded that they are without merit.

The judgment of the district court on the appeal in No. 72-1120 is affirmed.

IV.

SEC v. BANGOR PUNTA CORPORATION
(NOS. 72-1053 and 72-1140)

These are cross-appeals from a judgment entered November 17, 1971 after trial on the merits. 331 F.Supp. 1154 (S.D.N.Y. 1971). The SEC appeals from those provisions of the judgment which denied a permanent injunction against further violations of the securities laws and which imposed a condition upon BPC's rescission offer to former Piper shareholders. BPC cross-appeals from those provisions of the judgment which found BPC to have violated the securities laws and which ordered BPC to offer rescission to former Piper shareholders.

The SEC brought this action pursuant to Sections 20(b) and 22(a) of the 1933 Act, 15 U.S.C. §§77t(b) and 77v(a) (1970), and Sections 21(e) and 27 of the 1934 Act, 15 U.S.C. §§78u(e) and 78aa (1970). The complaint alleged that BPC's registration statement and prospectus for its Piper exchange offer violated the registration statement and prospectus requirement provisions of Sections 7 and 10(a) of the 1933 Act, 15 U.S.C. §§77g and 77j(a) (1970); and the antifraud provisions of both acts, Section 17(a) of the 1933 Act. 15 U.S.C. §77q(a) (1970), Section 10(b) of the 1934 Act, 15 U.S.C. §78j(b) (1970), and Rule 10b-5 promulgated under the 1934 Act, 17 C.F.R. §240.10b-5 (1972).

After trial of this action at the same time as the other two actions (the subject of the appeals in Nos. 72-1064 and 72-1120), the district court concluded that BPC had violated the securities laws, including the antifraud provisions of the 1933 and 1934 Acts. The court ordered that BPC offer rescission to all former Piper shareholders who had accepted BPC's exchange offer, subject to a condition which we shall discuss below. The court denied the SEC's

request that BPC be permanently enjoined from further violations of the securities laws.

On the SEC's appeal, to the extent the judgment is appealed from, we affirm in part, and reverse and remand in part. On BPC's cross-appeal, we affirm.

(A) Injunctive Relief

The district court concluded that, although BPC had violated the securities laws in disseminating a materially misleading registration statement and prospectus for a securities exchange offer, nevertheless "the Commission has failed to carry its burden to establish, with persuasive evidence, that Bangor-Punta, its officers, directors and employees have *a propensity or natural inclination* to violate the securities law." (emphasis added.) Accordingly, the court denied a permanent injunction against further violations. 331 F.Supp. at 1163. I disagree.[34]

Based upon the SEC's stautory responsibility under the 1933 and 1934 Acts[35] to seek a permanent injunction "[w]henever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation" of the provisions of such Acts or any rule or regulation promulgated thereunder, I believe that the district court erred in denying a permanent injunction and I emphatically dissent from the opinion of Judge Gurfein affirming the denial of

34 On this issue—the district court's denial of injunctive relief in the SEC's enforcement action—I would reverse the district court and remand with directions that it issue an injunction against further violations of the securities laws by Bangor Punta, its officers, directors and employees. But my opinion on this issue, I regret to say, has emerged as the minority view. The majority view is set forth in Judge Gurfein's separate opinion at pages 4991, 4966 *infra*.

35 Section 20(b) of the 1933 Act, 15 U.S.C. §77t(b) (1970); Section 21(e) of the 1934 Act, 15 U.S.C. §78u(e) (1970).

such injunction. The grounds of my dissent are as follows.[36]

(1) *Erroneous Standard*

First, the district court applied an erroneous standard in determining whether a permanent injunction should issue. The court held, as stated above, that the SEC had failed to show that "Bangor Punta, its officers, directors and employees have *a propensity or natural inclination* to violate the securities law." (emphasis added). It uniformly has been held that the correct standard is "whether there

36 As to one finding of the district court with respect to which the SEC challenges the denial of an injunction, although the issue is a very close one, I am inclined to agree with my colleagues that the district court's finding of fact should not be set aside as clearly erroneous. Fed. R. Civ. P. 52(a); *Heyman* v. *A. R. Winarick, Inc.*, 325 F.2d 584, 589 (2 Cir. 1963).

The SEC contends that the court erred in refusing to find that BPC had decided by the early summer of 1969 to sell its BAR holdings to Amoskeag for $5 million and chose deliberately to postpone effectuating the sale in order to avoid recording and disclosing a loss of $13 million. Upon reviewing the entire evidence with respect to this aspect of the matter, however, I agree that we are not "left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). The SEC relies heavily upon the testimony of Dumaine to establish that a deal had been made prior to the close of the Piper exchange offer. The district court, which observed the demeanor of the witness, concluded that his testimony was not worthy of belief. On such a determination, I agree that we should not substitute our views for those of the trial judge who heard and saw the witness. Nor do I believe that we should find unreasonable the court's inferences drawn from undisputed evidence that BPC's delay in consummating the deal resulted from a prudent business decision to ascertain, through a complete investigation of legal and accounting ramifications before closing the deal, the precise impact of the sale.

Since the issue on this point is very close, I could well be wrong and the SEC may be correct in urging that the district court's finding was clearly erroneous. Nevertheless, for the reasons stated above, I prefer to resolve any doubt on this point in favor of the correctness of the district court's finding—especially in view of the more persuasive reasons set forth below which in my opinion demand reversal of the district court's denial of an injunction.

is a reasonable likelihood that the wrong will be repeated". *SEC* v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1100 (2 Cir. 1972).[37] See *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953); *SEC* v. *Culpepper*, 270 F.2d 241, 249 (2 Cir. 1959). There is a meaningful difference between the standards of "propensity or natural inclination to violate" and "reasonable likelihood that the wrong will be repeated". The district court's failure to perceive this difference and my colleagues' sanctioning the application of an erroneous standard cuts to the core of the error committed. This leads to the second ground of my dissent.

(2) *Requirement of Intent*

Second, in sanctioning a standard of "propensity or natural inclination to violate the securities laws", my colleagues have engrafted upon the standard required for an injunction in an SEC enforcement action a requirement not

37 In *SEC* v. *Manor Nursing Centers, Inc., supra*, we expressly *rejected* appellants' contention that "the SEC must show more than a reasonable likelihood of future violations. . . . [A]ppellants must be shown to have a propensity or natural inclination to violate the securities laws." 458 F.2d at 1101.

In *Manor Nursing*, referring to the district court's opinion below in the instant case, we assumed that "it was not purporting to apply a new standard for the issuance of an injunction" in view of the court's reliance upon our decision in *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301 (2 Cir.), *cert. denied*, 404 U.S. 1005 (1971). 458 F.2d at 1101.

Since the author of the present opinion also was the author of *Manor Nursing*, I can state unequivocally that the *Manor Nursing* court was totally unfamiliar with the record in the instant case, other than the district court's opinion reported at 331 F.Supp. 1154; and of course, as with Judge Pollack when he denied the permanent injunction in the instant case, we did not know at the time of our decision in *Manor Nursing* that the conduct of Bangor Punta here ultimately would be held, as we now hold, to constitute serious violations of the antifraud provisions of the federal securities laws—including such conduct as recklessly failing to disclose in its registration statement and prospectus the true value of the BAR: hardly a minor omission, but a $13 million one.

required by Congress, by the Supreme Court or by our Court (prior to today's decision), namely, a *purposeful* violation of the securities laws and a showing of *intent*. In Judge Gurfein's words (p. 4994 *infra*), "In the last analysis we are dealing with *intent* . . . ." (emphasis added). I disagree.

To impose upon the SEC the burden of showing evil motive or intent to violate the securities laws as a condition to obtaining an injunction against further violations would be tantamount to converting a civil injunction enforcement proceeding into a criminal prosecution. As the Supreme Court said in reversing our Court in *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963):[38]

> "This, of course, is but another way of putting the rejected argument that the elements of technical common-law fraud—particularly intent—must be established before an injunction requiring disclosure may be ordered. It is the practice itself, however, with its potential for abuse, which 'operates as a fraud or deceit' within the meaning of the Act when relevant information is suppressed. . . . Failure to disclose material facts must be deemed fraud or deceit within its intended meaning, for, as the experience of the 1920's and 1930's amply reveals, the darkness and ignorance of commercial secrecy are the conditions upon which

38 *Capital Gains* involved the showing the SEC was required to make in order to obtain an injunction compelling disclosure under the Investment Advisers Act of 1940. The Court held that "Congress, in empowering the courts to enjoin any practice which operates 'as a fraud or deceit' . . . did not intend to require proof of intent to injure . . . . Congress intended [the Act] to be construed like other securities legislation 'enacted for the purpose of avoiding frauds,' not technically and restrictively, but flexibly to effectuate its remedial purposes." 375 U.S. at 195.

This applies a fortiori to the remedial injunctive provisions of the 1933 and 1934 Acts pursuant to which the SEC brought the instant injunction action. See note 35 *supra*.

> predatory practices best thrive. To impose upon the Securities and Exchange Commission the burden of showing deliberate dishonesty as a condition precedent to protecting investors through the prophylaxis of disclosure would effectively nullify the protective purposes of the statute." 375 U.S. at 200.

The absence of any such requirement of intent for an injunction under Section 20(b) of the 1933 Act or Section 21(e) of the 1934 Act is borne out by the provision in each section, immediately following the authorization for the SEC to seek an injunction, empowering "[t]he Commission [to] transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings. . . ." 15 U.S.C. §§77t(b) and 78u(e) (1970). In short, Congress itself has made separate provision for the SEC to institute civil injunction proceedings on the one hand, and to submit criminal reference reports to the Attorney General on the other hand; a showing of intent clearly is required for the latter, and equally clearly not required for the former.

(3) *Injunction to Protect Public Interest*

Third, the district court totally failed to recognize that an injunction in an SEC enforcement proceeding is sought to protect public rather than private interests. Doubts as to whether an injunction sought in such a proceeding is necessary to safeguard the public interest should be resolved in favor of granting the injunction. See *United States* v. *First National City Bank,* 379 U.S. 378, 383 (1965); *Mitchell* v. *Pidcock,* 299 F.2d 281, 287 (5 Cir. 1962). As Judge Smith recently observed, there is a vital distinction between the function of a district court in determining whether to issue an injunction in an action between

two private litigants and its function in an action by a government agency seeking an injunction to enforce an Act of Congress:

> "But the function of a court in deciding whether to issue an injunction authorized by a statute of the United States to enforce and implement Congressional policy is a different one from that of the court when weighing claims of two private litigants. . . .
>
> The passage of the statute is, in a sense, an implied finding that violations will harm the public and ought, if necessary, be restrained . . . ." *United States* v. *Diapulse Corporation of America,* 457 F.2d 25, 27-28 (2 Cir. 1972).

Not only did the district court fail to recognize this vital distinction between an injunction sought in an SEC enforcement action to protect the public interest and one sought to protect private interests in private litigation, but my colleagues appear also to have misapprehended the distinction.[39]

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39 For example, Judge Mansfield concludes his dissenting opinion thus (p. 5020, *infra*):

> ". . . I am convinced that a julgment which (1) awards compensatory damages to CCI, (2) bars BPC from voting its illegally acquired Piper shares, and (3) awards rescission to former Piper stockholders who exchanged their shares in response to BPC's tender offer, amply protects the public interest and insures against any reasonable likelihood that BPC will engage in similar conduct in the future."

Such a notion that, once private interests in separate but related litigation have been resolved, the public interest is ipso facto protected and the need for an injunction in a separate SEC enforcement action is ipso facto eliminated, is a concept I find difficult to grasp. Surely it is a far cry from Judge Smith's perceptive recognition of "the function of a court in deciding whether to issue an injunction authorized by a statute of the United States to enforce and implement Congressional policy".

(4) *BPC's Past Violations*

Fourth, the primary factor in deciding whether past violations, now terminated, constitute a proper basis upon which to find a reasonable likelihood that defendants will commit further violations is the nature of the past violations. *SEC* v. *Manor Nursing Centers, Inc., supra,* 458 F.2d at 1100-01; *SEC* v. *Culpepper, supra,* 270 F.2d at 250; *United States* v. *W. T. Grant Co., supra,* 345 U.S. at 633.

To me, nothing could be clearer than the fact that BPC's omissions from its registration statement and prospectus—again, not minor omissions, but including a $13 million one—constituted violations of the securities laws of the most flagrant character. It was inevitable that a large loss would occur and that such loss would have an enormous impact on a company of BPC's size and character. See *SEC* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833, 849 (2 Cir. 1968) (en banc), *cert. denied sub nom. Kline* v. *SEC,* 394 U.S. 976 (1969).

The district court found that such omissions were materially misleading. It nevertheless concluded that BPC did not *intentionally* or *purposefully* mislead and did not act in *bad faith.* It therefore denied the injunction. In my view, this was clearly erroneous.

On the basis of the district court's own findings, it follows as the day the night that BPC's actions were sufficiently culpable to portend that similar violations would occur in the future. A duty is imposed by law upon persons issuing securities to make a careful judgment as to what information a reasonable investor requires. BPC's management was aware of the circumstances indicating that the book value of the BAR was unrealistic. Cf. *SEC* v. *Great American Industries, Inc.,* 407 F.2d 453, 456-60 (2 Cir. 1968) (en banc), *cert. denied,* 395 U.S. 420 (1969); *Heit* v. *Weitzen,* 402 F.2d 909 (2 Cir. 1968), *cert. denied,*

395 U.S. 903 (1969). Nondisclosure of facts of a similar nature long has been condemned under the federal securities laws. BPC may not be heard to claim that its conduct in question had not been clearly declared unlawful prior to the instant suit. Cf. *SEC* v. *Keller Corp.,* 323 F.2d 397 (7 Cir. 1963).

Furthermore, BPC's misleading omissions from its registration statement and prospectus were made in the teeth of a consent decree which had been entered in the District Court for the District of Columbia on May 26, 1969 enjoining BPC from publicizing its exchange offer prior to filing a registration statement in compliance with "the registration provisions of the Federal securities laws." We recently have held that "[i]t was entirely proper to issue an injunction" when, inter alia, "appellants continued to violate the federal securities laws even after a consent decree had been entered enjoining them from such conduct." *SEC* v. *Koenig,* 469 F.2d 198, 202 (2 Cir. 1972).

Also here, as in *Koenig,* BPC and its named officers "have persisted in their contention that their past conduct was not improper". 469 F.2d at 202. This is another factor which was not taken into account, but should have been, by the district court in assessing the need for a permanent injunction. *SEC* v. *Manor Nursing Centers, Inc., supra,* 458 F.2d at 1101; *SEC* v. *MacElvain,* 417 F.2d 1134, 1137 (5 Cir. 1969), *cert. denied,* 397 U.S. 972 (1970); *Hecht Co.* v. *Bowles,* 321 U.S. 321, 331 (1944).

(5) *BPC as a Conglomerate*

Fifth, where violations of the securities laws have been committed in the past by a corporation through its officers, the nature of the corporation and its officers is an important consideration in determining the likelihood of further violations. See *SEC* v. *Texas Gulf Sulphur Co., supra,*

446 F.2d at 1306; *SEC* v. *Mono-Kearsarge Consol. Mining Co.*, 167 F.Supp. 248, 261 (D. Utah 1958). BPC is a conglomerate with holdings in diversified fields. It long has been interested in new acquisitions. Tender offers of the type involved in this litigation are becoming a popular means of achieving acquisitions. There is a reasonable likelihood that BPC will become involved in similar tender offers in the future. Such involvement is likely also to entail more battles for control.[40] As we observed in *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 948 (2 Cir. 1969), contests for control often are heated engagements in which both sides will resort to any means to achieve victory. It is when the temptation to violate the law is strongest that the greatest deterrence is necessary.

(6) *Abuse of Discretion*

Sixth, Judge Gurfein's opinion emphasizes that the standard for reviewing the district court's denial of injunctive relief is whether there was an abuse of discretion. I agree.

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40 Judge Gurfein's observation, "Nor do we believe that a conglomerate should be more harshly judged than others" (p. 4996 *infra*), strikes me as missing the point. I do not suggest that BPC be judged by any different *standard* than others. What I do say, as the cases hold, is that the *nature of a corporation* which has committed flagrant violations of the securities laws in the past has an important bearing upon the likelihood of recurrence of such violations. Any judge who has been required to study in depth the operations, and particularly the acquisitions, of a major conglomerate, knows that tender offers are an integral part of their way of life. See *United States* v. *International Telephone & Tel. Corp.*, 306 F.Supp. 766 (D. Conn. 1969), and 324 F.Supp. 19 (D.Conn. 1970). And any realistic estimate of the conduct of participants such as BPC and its officers in a tender offer contest, *based on their past performance in such a contest*, will acknowledge that "[t]hey act quickly, sometimes impulsively, often in angry response to what they consider, whether rightly or wrongly, to be low blows by the other side." *Electronic Specialty Co.* v. *International Controls Corp.*, *supra*, 409 F.2d at 948.

I stand four square on what I said in *SEC* v. *Manor Nursing Centers, Inc.*, *supra*:

> "In an action, such as the instant one, where the SEC sought injunctive relief under Section 20(b) of the 1933 Act, 15 U.S.C. §77t(b) (1970), and under Section 21(e) of the 1934 Act, 15 U.S.C. §78u(e) (1970), a district court has broad discretion to enjoin possible future violations of law where past violations have been shown, and the court's determination that the public interest requires the imposition of a permanent restraint should not be disturbed on appeal unless there has been a clear abuse of discretion. SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1306-7 (2 Cir.), cert. denied, 404 U.S. 1005 (1971); SEC v. Culpepper, 270 F.2d 241, 250 (2 Cir. 1959). *Moreover, the party seeking to overturn the district court's exercise of discretion has the burden of showing that the court abused that discretion, and the burden necessarily is a heavy one.* SEC v. Culpepper, *supra*, 270 F.2d at 250; United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953). In the instant case, we hold that appellants have not sustained that burden, for the record amply supports the district court's conclusion that the issuance of a permanent injunction was appropriate." (emphasis added) 458 F.2d at 1100.

Of course, our appellate review in *Manor Nursing* was addressed to the *grant* of an injunction in an SEC enforcement proceeding. Here we are reviewing the *denial* of such an injunction. Our scope of review would appear to be different. As Judge Waterman stated in *NMU* v. *Commerce Tankers Corp.*, 457 F.2d 1127 (2 Cir. 1972):[41]

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41 *Commerce Tankers* involved the denial of an injunction authorized pursuant to an Act of Congress, i.e. Section 10(*l*) of the National Labor Relations Act, 29 U.S.C. §160(*l*) (1970).

"Were this an appeal from the *grant* after an evidentiary hearing of [an] injunction our scope of inquiry could be limited by the 'clearly erroneous' test. However, when the appeal is from the *denial* of a petition for [an] injunction, it seems that, in light of the congressional policy favoring the grant of such injunctions in appropriate circumstances, our scope of review ought not to be so limited." (emphasis that of the Court) 457 F.2d at 1133-34.

In any event, whatever abuse of discretion standard be applied, in my view the district court's denial of an injunction here was a plain abuse of discretion—even on the record then before the court.[42] And surely, in view of our decision today holding that BPC's conduct constituted flagrant violations of the antifraud provisions of the federal securities laws—a holding of course unknown to the district court when it denied the permanent injunction—it would seem to me that at the very least we should remand the case to the district court, as we did in *SEC* v. *Texas Gulf Sulphur Co., supra,* "for a further determination below, in the light of the approach explicated by us in [our opinion filed today] as to whether, in the exercise of its discretion, the injunction against [BPC] which the Commission seeks should be ordered." 401 F.2d at 864.

42 Judge Grufein refers to "the experienced trial Judge below . . . a trial judge experienced in the securities field." I agree that Judge Pollack is indeed a trial judge thoroughly experienced in this field. And I yield to no judge on our Court in my firm belief that a district judge's exercise of discretion should not be reversed absent a clear showing of abuse; the record of decided cases in our Court bears this out.

But it does strike me that all of this begs the question. After more than a dozen years on the federal bench—mostly as a district judge—I have never discerned any notable reticence on the part of federal appellate judges about reversing a district judge upon a showing of abuse of discretion. Indeed, the benchmark of a truly competent district judge—as with Judge Pollack in the instant case—is his capacity to insure that the record demonstrates with crystal clarity the basis of his exercise of discretion, so that a reviewing court can determine abuse or the absence of abuse.

(7) *Mischievous Precedent*

Finally, today's judgment and opinion by the majority of this panel affirming the denial of a permanent injunction in this SEC enforcement action, in my opinion, will cause mischief in the enforcement of the federal securities laws.

The decision undercuts the strong policy of this Court of encouraging vigorous enforcement of the securities laws. Its radiations will have their impact beyond this Circuit, since other courts look to us for guidance in this area.

In my view, no decision during the four decades the federal securities laws have been on the books will more effectively cripple the salutory enforcement program of the Securities and Exchange Commission than today's 2-1 decision by the majority of this panel on this issue.

I therefore respectfully but most emphatically dissent from the denial of a permanent injunction.

I would hold that the district court erred in denying the SEC's request for a permanent injunction against further violations of the securities laws; and I would remand with directions that the district court issue such an injunction.

(B) Rescission Order

The district court concluded that BPC would be required to make an offer of rescission to former Piper shareholders who accepted the BPC exchange offer. It directed the parties to submit an appropriate decree for the court's consideration. 331 F.Supp. at 1162.

The decree as entered provided, among other conditions not contested on appeal, that if the rescinding Piper share-

holder previously had sold the BPC securities received in the exchange offer, he must tender to BPC—in addition to the amount of securities he received plus dividends and interest paid (or due and payable) thereon—a cash payment equal to the excess, if any, of his sales proceeds from the original BPC securities over his cost of repurchasing the substitute BPC securities which he tenders to BPC. Both parties on appeal challenge the rescission order but for different reasons.

Before considering the propriety of the district court's order, we must decide whether a federal district court has the power, at the request of the SEC, to order rescission or restitution. The SEC has no express statutory authority to seek rescission, restitution, or other forms of equitable monetary relief. The Commission, however, may institute an action for injunctive relief and, once the equity jurisdiction of the district court has been properly invoked, the court has power to grant all equitable relief necessary under the circumstances. *SEC* v. *Manor Nursing Centers, supra*, 458 F.2d at 1103-04, and authorities there cited. See generally 1 Pomeroy, Equity Jurisprudence §236a (5th ed. 1941). As the Supreme Court said in an analogous situation:

> "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief *in light of the statutory purpose.*" *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960). (Emphasis added).

Accord, *SEC* v. *Texas Gulf Sulphur Co., supra,* 446 F.2d at 1307-08. Ancillary relief contributes to effective enforcement of the securities laws by depriving defendants of gains made through violations, by deterring future violations, and by increasing the overall efficiency of Rule 10b-5 and similar actions. See generally Note, *Ancillary Relief in SEC Injunction Suits for Violation of Rule 10b-5,* 79 Harv. L. Rev. 656 (1966). Accordingly, we hold that the SEC can seek ancillary equitable relief where, as in the instant action, it is necessary to effectuate the statutory purpose.

BPC challenges the rescission order on the ground that a former Piper shareholder who has disposed of the BPC securities he received on the exchange offer should not be eligible for rescission. It argues that, since a Piper shareholder so situated could not obtain rescission if he brought the action himself, the SEC should not be permitted to seek rescission for him. The defect in this argument is that a Piper shareholder could purchase substitute shares and demand rescission if he brought his own rescission action. BPC maintains that a shareholder can sue only under §11 or §12(2) of the 1933 Act and that neither of those provisions permits rescission where the plaintiff no longer holds the shares. We need not decide whether BPC's interpretation of these provisions is correct because a defrauded shareholder also can bring suit for rescission and restitution under §10b of the 1934 Act, *Errion* v. *Connell*, 236 F.2d 447 (9 Cir. 1956), or under §29(b) of the 1934 Act, *Geismar* v. *Bond & Goodwin, Inc.*, 40 F.Supp. 876 (S.D.N.Y. 1941). Although the issue appears not to have been resolved, it is reasonable to assume with respect to such claims that a shareholder seeking rescission, even if he has disposed of his shares, should be permitted to tender substitute shares. See Restatement of Restitution §66(4) (1937); 3 Loss, Securities Regulation 1792-93 (2d ed. 1961, Supp. 1969). Furthermore, the SEC requests this rescission order not merely to compensate Piper shareholders for their loss but also to implement the broader statutory purpose of protecting the public

interest through effective enforcement of the securities laws. Limitations on the relief available in actions brought by private parties are not necessarily applicable to SEC enforcement proceedings. We hold that the district court was correct in permitting former Piper shareholders who had disposed of the BPC securities received on the exchange offer to tender substitute shares.

The SEC challenges the condition of the rescission order that requires a tendering Piper shareholder to return any profit he may have realized from the sale of his BPC securities and the purchase of substitute shares on the present market at a lower price. It is true that a prerequisite to the remedy of restitution is that a party seeking rescission must return any proceeds he has received from the transaction being rescinded in order to be placed in *status quo ante*. *Mott* v. *Tri-Continental Financial Corp.*, 330 F.2d 468, 470-71 (2 Cir. 1964). But the "proceeds" that must be returned are those received as consideration from the other party. That does not necessarily include profits realized from an interim sale resulting from fortuitous events which occurred subsequent to the transaction. It would be inequitable to require the tender of these profits where, as here, the other party is not required concomitantly to underwrite losses. The effect of the condition imposed by the district court is to render ineffective the rescission remedy.[43]

We hold that the district court erred in imposing the condition requiring restitution of interim profits; and we remand with directions that the judgment be modified by deleting that condition from the rescission order.

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43 There can be no expectation that the Piper shareholders will tender unless the market for their shares upon rescission is an open and free one. Such a market cannot exist where the price to be paid for the assignment of a right by each individual Piper shareholder is subject to different fact situations.

On its cross-appeal, BPC argues with regard to its exchange offer that it did not fail to disclose facts which a reasonably prudent investor would deem to be material. We have dealt with this issue at length in our opinion above in *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corporation, et al.* (No. 72-1064). Our decision on this issue there is conclusive here.

On the SEC's appeal in No. 72-1053, to the extent the judgment is appealed from, we affirm in part, and reverse and remand in part. On BPC's cross-appeal in No. 72-1140, we affirm.

SUMMARY

The following is a summary of our essential holdings in each of the three appeals.

In CHRIS-CRAFT INDUSTRIES, INC. v. PIPER AIRCRAFT CORPORATION, ET AL. (No. 72-1064). we hold that:

(1) Chris-Craft has standing under the antifraud provisions of §14(e) of the 1934 Act to sue defendants for damages.

(2) The record establishes violations of §14(e) on the part of all defendants, i.e. the Piper family defendants (not the Piper Aircraft Corporation); Bangor Punta Corporation and its named officers; and the First Boston Corporation and its named officers.

(3) Under appropriate principles of causation, the acts and conduct of each of the defendants in violation of §14(e) caused injury to Chris-Craft for which it is entitled to be compensated.

(4) Chris-Craft also is entitled to recover damages from Bangor Punta for the injury caused by Bangor Punta's cash purchases of large blocks of Piper

stock during the pendency of Bangor Punta's exchange offer for Piper shares, in violation of Rule 10b-6 under the 1934 Act.

(5) The judgment of the district court dismissing the complaint is reversed and the case is remanded with directions to enter judgment awarding damages and equitable relief in accordance with our opinion.

In BANGOR PUNTA CORPORATION v. CHRIS-CRAFT INDUSTRIES, INC. (No. 72-1120), we hold that:

(1) Bangor Punta failed to prove its claim of unlawful market manipulation of Chris-Craft stock.

(2) Bangor Punta failed to prove its claim of illegal warehousing of Chris-Craft stock.

(3) The judgment of the district court dismissing the complaint is affirmed on the ground that Bangor Punta failed to adduce sufficient evidence to support its claims that Chris-Craft violated the securities laws or that such violations caused injury to Bangor Punta.

In SEC v. BANGOR PUNTA CORPORATION (Nos. 72-1053 and 72-1140), to the extent the judgment is appealed from, we hold that:

(1) The district court did not err in denying the SEC's request for a permanent injunction against further violations by Bangor Punta of the securities laws.

(2) The district court erred in imposing, as a condition to its order that Bangor Punta offer rescission to all Piper shareholders who had accepted Bangor Punta's exchange offer, the requirement that such shareholders make restitution of any interim profits realized by them on the sale of their Bangor Punta

securities; and the case is remanded with directions that the judgment be modified by deleting that condition from the rescission order.

(3) On Bangor Punta's cross-appeal, we affirm the judgment of the district court.

CHRIS-CRAFT v. BANGOR PUNTA

GURFEIN, *District Judge*, concurring.

I concur generally in Judge Timbers' scholarly opinion except as to the injunction sought by the SEC.

In view of the apparent disparity between the views of my brothers I respectfully comment on some of the points raised.

STANDING

With respect to standing I am inclined to agree with Judge Mansfield that there is no constitutional question. My approach is, moreover, much closer to Judge Pollack's though I disagree with his conclusion. It seems to me he was right in approaching the problem as one of causation before considering the question of standing. If there is no causation standing becomes a rather abstract conception. Since the seven per cent illegally acquired by BPC caused it to win the contest, the loser has standing. I think it unnecessary to say that a defeated contender who won a booby prize of say, one per cent of the stock, would have standing simply because he entered the lists and lost.

SCIENTER AND CAUSATION

I agree that some kind of scienter must be shown. But I do not think a litmus paper test of scienter will ever

be found. I am content to accept the general formulation that mere negligence will not suffice in a private action for money damages and that "recklessness that is equivalent to wilful fraud," *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 868 (Friendly, *C.J.* concurring), is required for a violation of Section 14(e) as well as of Section 10(b). In modern times statutory construction grows case by case much as the common law did when more general rules of law were involved. And I venture to say that stability may be more easily attained by analogizing from decided cases whose facts are known than by guessing what may come within some general rule which must of necessity be inchoate if only for want of the gift of prophecy.

§10(b)(6)

With respect to the Section 10(b)(6) violation I limit my concurrence to agreement that there was such a violation as we held in *Chris-Craft Industries, Inc.* v. *Bangor Punta Corp.*, 426 F.2d 569, 576-77 (2 Cir. 1970), and would hold that since the block purchases were necessary for control causation was established. I do not think we are required in this case to pass more precisely on the general question whether a purchase off the market that does not affect the tape causes price fluctuations and damage simply because it is a violation of Section 10(b)(6). On that question Judge Pollack, in my respectful submission, was right.

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF-APPELLANT-APPELLEE v. BANGOR PUNTA CORPORATION, DEFENDANT-APPELLEE-APPELLANT

INJUNCTIVE RELIEF

Judge Mansfield and I do not agree that Judge Pollack's denial of injunctive relief to the SEC against BPC should

be reversed. We respectfully suggest that the matter is not so clear that we should substitute our judgment for the judgment of the experienced trial Judge below who sat as a chancellor in equity. He heard the witnesses and had the opportunity by observation better to prophesy future conduct than we can on this printed record.

The days are long since past when appellate courts in the federal system in equity cases reviewed findings of fact *de novo*. The scope of appellate review is more sharply limited even in causes that would have been formerly classed as proceedings in equity. The findings of the trial Court must be clearly erroneous or they will not be set aside. Fed.R.Civ.P. 52(a).

Specifically, the test for review of the denial of injunctive relief is whether there has been an abuse of discretion. See *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633, 634 (1953). In *United States* v. *W.T. Grant Co.* the Supreme Court said that for reversal "the Government must demonstrate that there was no reasonable basis for the District Judge's decision." 345 U.S. at 634. And this Court has recognized that this rigorous limitation on appellate review applies to SEC actions for injunctive relief as well. As was said in *SEC* v. *Manor Nursing Centers Inc.*, 458 F.2d 1082, 1100 (2 Cir. 1972), "the party seeking to overturn the district court's exercise of discretion has the burden of 'showing that the court abused that discretion, and the burden necessarily is a heavy one.' *SEC* v. *Culpepper, supra*, 270 F.2d at 250; *United States* v. *W.T. Grant*, 345 U.S. 629, 633 (1953)." I think we lose sight of these accepted principles if we reverse and order the issuance of a permanent injunction in this case.

Here Judge Pollack found against the SEC on its primary contention. He found that there was no purposeful withholding of the completion of the Dumaine negotiation

until the contest for Piper was over. 331 F.Supp. 1154 at 1160. We cannot set this finding aside as clearly erroneous on this record. This is a weighty finding by a trial Judge experienced in the securities field. In the last analysis we are dealing with intent and must seek to determine whether there is a likelihood of recurrence of unlawful activity and a need for a prophylactic against recidivism. Who is better able to determine such things than the Judge who saw and heard the witnesses and got the feel of what happened?

In the opinion in the other cases decided today, we accept the District Court's "inferences drawn from undisputed evidence" that the delay in consummating the deal resulted from a prudent business decision to investigate the legal and accounting impact of the sale.

Judge Timbers argues that there is a "core" difference between the standard of "a propensity or natural inclination to violate the securities law" attributed to Judge Pollack, and the test offered by Judge Timbers' opinion "whether there is a reasonable likelihood that the wrong will be repeated." Of course the statute expresses it as "any person [who] is engaged or about to engage in any acts or practices which constitute or will constitute a violation." The use of either test, if indeed they differ except in verbiage, is not the subject of immutable statutory command. We do not see sufficient difference in the standards juxtaposed to find that the District Court erred as a matter of law. Indeed, if one wished to be finicky, Judge Timbers' formulation is the more limited—"*the* wrong will be repeated" implying a rather narrowly repetitive violation while the propensity standard covers a multitude of violations (emphasis supplied). We emphasize that we are not in the least interested in limiting the basis for an SEC injunction as a matter of general rule.

The dissent also misinterprets our view on intent. We are not limiting our injunctive relief to common law fraud as is implied from the citation of *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 200 (1968). Nor are we eliminating reckless conduct that may be tantamount to culpable negligence from the proper basis for injunctive relief at the instance of the Commission. Nor do we treat as unimportant the public interest as is suggested.

Since we do not deny that in a proper case even sustained recklessness can be the basis for injunctive relief there is no such divergence of opinion in the abstract as Judge Timbers suggests. We repeat that we are not the finders of fact. The impact of our decision is, by its terms, limited to the scope of appellate review.

In *Texas Gulf Sulphur, supra,* this Court simply remanded "the cause as to it [Texas Gulf Sulphur Company] for a further determination *below,* in the light of the approach explicated by us in the foregoing opinion, as to whether in the exercise of *its* discretion, the injunction against it which the Commission seeks should be ordered" (emphasis supplied). And as Chief Judge Friendly said in concurring: "Absent much clearer language than is found in the 1934 Act, the entitlement of a plaintiff to an injunction thereunder remains subject to principles of equitable discretion." He pointed out that Judge Bonsal had acted on the erroneous belief that "no violation of the Rule had occurred and he was without power to enjoin," but Chief Judge Friendly wrote: "If Judge Bonsal had denied an injunction on these grounds [i.e. 'no danger of repetition'], I see no basis on which we could properly have reversed him." 401 F.2d at 869.

In the instant case the District Judge found that the omission in the registration statement was material, but in his discretion, considering the public interest, he did not

enjoin because he did not believe there was likelihood of recurrence. 331 F.Supp. at 1162-63. We do not consider that to be such an abuse of discretion as to support reversal. And "abuse of discretion" it would have to be. See *Hecht Co.* v. *Bowles*, 321 U.S. 321, 331 (1944).

Nor do we believe that a conglomerate should be more harshly judged than others. The issue is not whether it will seek other acquisitions but rather how it will go about doing them.

In any event sanctions need not be cumulative. Damages tend to have a didactic effect. The SEC has, through our decision in the companion cases now largely achieved its commendable purpose. Further to enjoin we think would be to add yet another star to the flag of a battle already won. The denial of an injunction is affirmed.

MANSFIELD, *Circuit Judge* (Concurring and Dissenting):

I concur in those results reached in Judge Timbers' opinion which represent the majority opinion as to issues other than injunctive relief, except that I dissent from the reversal of the district court's dismissal of CCI's suit against the Piper family defendants.

I also concur in Judge Gurfein's opinion to the extent that it represents the majority decision affirming the denial of injunctive relief.

With due respect for my brother Timbers' exhaustive analysis of these complicated cases in his opinion ("main opinion" herein), I find myself in disagreement with some of his conclusions and reasoning. I would also limit our discussion to those legal principles necessary for adjudication of the issues presented rather than engage in unnecessary dicta in this sensitive area. The Supreme Court has urged that judicial construction of the anti-fraud provi-

sions of the federal securities laws be limited to what is essential for the decision at hand:

> "Although §10(b) and Rule 10b-5 may well be the most litigated provisions in the federal securities laws, this is the first time this Court has found it necessary to interpret them. We enter this virgin territory cautiously. The questions presented are narrow ones. They arise in an area where glib generalizations and unthinking abstractions are major occupational hazards. Accordingly, in deciding this particular case, remembering what is not involved is as important as determining what is. With this in mind, we turn to respondents' particular contentions." *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 465 (1969).

Several points discussed in Judge Timbers' opinion, while interesting, strike me as both irrelevant to the issues and as a source of possible confusion to readers. Other observations go much further than is necessary. With still others I must respectfully disagree. For these reasons I find it necessary to state my own differing views in this area. In doing so I shall follow the sequence of the main opinion.

Function of Private Damage Suits

I agree that the anti-fraud and anti-manipulation sections of the federal securities laws were designed to insure against distortion and falsity in the purchase and sale of securities, and that private damage suits based upon violation of those laws should be encouraged as a means of supplementing governmental action in the vigorous enforcement of those laws. See *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); Fleischer, *"Federal Corporation Law": An Assessment*, 78 Harv. L. Rev. 1146, 1172-79

(1965); Lowenfels, *Implied Liabilities Based Upon Stock Exchange Rules,* 66 Colum. L. Rev. 12; Lowenfels, *Private Enforcement in the Over-the-Counter Securities Markets; Implied Liabilities Based on NASD Rules,* 51 Cornell L.Q. 633 (1966). However, it is unrealistic and fanciful to suggest that through such suits "society can obtain the maximum amount of its preferred goods and services that our resources can produce."

Full disclosure may go far toward achieving a fair and honest marketplace for trading of securities. But honesty cannot be equated with efficiency in the use of funds or assets realized from a public issue or tender offer. One need only look at the dockets of our federal district courts to appreciate that bankruptcies of honest entrepreneurs are all too common.

CCI's Standing

With due respect for the views of the author of the main opinion, the issue before us is not whether "CCI has standing in a constitutional sense." If that were the issue, it could be settled by a one-line reference to the Supreme Court's decision in *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150 (1970). The issue is one of statutory construction: Does §14(e) confer standing upon a defeated competitor for control to sue the successful party for damages based on its violation of the anti-fraud provisions of the securities acts?

The federal securities laws are silent on the subject of a private party's standing to sue. Indeed, neither §14(e) nor §10(b) or Rule 10b-5 state that purchasers, sellers, or exchangers of securities have the right to sue. However, their implied standing to sue has long since been judicially established, *Kardon* v. *National Gypsum Co.,* 69 F. Supp. 512 (E.D. Pa. 1946). I would recognize CCI's standing solely on the ground that vigorous enforcement of the

anti-fraud provisions through private litigation, *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964), calls for similar implication of a private right of action in favor of a defeated contestant against the successful bidder for control for damages caused by the latter's violation of that section, see *Crane Co.* v. *Westinghouse Air Brake Co.,* 419 F.2d 787 (2d Cir. 1969), *cert. denied,* 400 U.S. 822 (1970), especially in view of our willingness to permit the target corporation to seek relief against the offeror under §14(e). *Electronic Specialty Co.* v. *International Controls Corp.,* 409 F.2d 937 (2d Cir. 1969); *Butler Aviation International Inc.* v. *Comprehensive Designers, Inc.,* 425 F.2d 842 (2d Cir. 1970).

Scienter

It is generally agreed in this Circuit that some form of *scienter* is required to support a private damage claim based upon a violation of Rule 10b-5, compare *SEC* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833, 855, 863, 866-68 (Friendly, Ch. J., concurring) (2d Cir. 1968) (*en banc*), *cert. denied sub nom. Kline* v. *SEC,* 394 U.S. 976 (1969), with *Globus* v. *Law Research Service, Inc.,* 418 F.2d 1276, 1290 (2d Cir. 1969), *cert. denied,* 397 U.S. 913 (1970), and while less than the specific fraudulent intent required to prove common law fraud will suffice, mere negligence is not enough, *Shemtob* v. *Shearson, Hammill & Co.,* 448 F.2d 442, 445 (2d Cir. 1971).[1] No reason has been advanced for a different standard in the enforcement of §14(e), the language of which is substantially the same as that found in §10(b) and Rule 10b-5.

In the present case, although an intent to defraud has not been shown, defendants' conduct amounted to more than mere negligence. Our answer to the question of

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1 See VI L. Loss, Securities Regulation 3883-88 (Supp. to 2d ed. 1969).

whether the proof was sufficient to satisfy the *scienter* requirement depends, therefore, upon the standard that is to govern the gray area between the extremes of specific fraudulent intent, on the one hand, and mere negligence, on the other. In my view that standard cannot be satisfactorily described in such abstract terms as "culpability," a generality frequently associated with any blameworthy or even criminal conduct, see I Working Papers of the National Committee on Reform of Federal Criminal Laws 123 (July 1970), much less as "fraud," "constructive fraud," "bad faith" or various gradations of "recklessness."

If there is to be a meaningful *scienter* standard, it should, if possible, be stated in more specific terms. Of course it might vary according to the existence of a fiduciary relationship, the burden of proof and the nature of the relief sought.[2] It might also take into account the nature and duties of the corporate posts held by the defendants, whether they are insiders or outsiders, and whether they are active or inactive participants. See generally Mann, *Rule 10b-5: Evolution of a Continuum of Conduct to Replace the Catch Phrases of Negligence and Scienter*, 45 N.Y.U.L. Rev. 1206 (1970). However, if we are unable to state a standard with some degree of precision, we should frankly confess that the only method of describing the element of *scienter* is by illustration rather than by categorization or rule of general application. See, e.g., Bucklo, *Scienter and Rule 10b-5*, 67 Nw. U.L. Rev. 562, 568 (1972). *Scienter*, like obscenity, would then simply be

2 We have indicated that the *scienter* requirement in suits for injunctive relief may be less strict than that in damage actions. *Mutual Shares Corporation* v. *Genesco Inc.*, 384 F.2d 540, 547 (2d Cir. 1967); *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 863 (per Waterman, J.), 866-68 (Friendly, J., concurring) (2d Cir. 1968), *cert. denied sub nom. Kline* v. *SEC*, 394 U.S. 976 (1969); *SEC* v. *Great American Industries Inc.*, 407 F.2d 453, 463 (2d Cir. 1968) *(en banc)*, *cert. denied*, 395 U.S. 920 (1969) (concurring opinion of Kaufman, J.).

something recognized when seen, but not otherwise definable. Cf. *Jacobellis* v. *Ohio*, 308 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not attempt further to define the kinds of material. . . . But I know it when I see it. . . . "). But I believe that an applicable *scienter* rule can be formulated and defined.

Congress' use of the words "fraudulent," "deceptive" and "manipulative" in §14(e), when coupled with the partially similar language and the legislative history of the earlier-enacted §10(b), indicates that its purpose was not to punish mere negligence, see S. Rep. 792, 73d Cong., 2d Sess. 6 (1934), *Kohn* v. *American Metal Climax Inc.*, 458 F.2d 255, 279-80 (3d Cir. 1972) (concurring and dissenting opinion of Adams, J.), but that the law was aimed at misrepresentations or omissions involving *some degree of awareness* on the part of the corporate officer charged. If Congress had intended to impose absolute liability, subject to a "due diligence" or "good faith" defense, it could have used language similar to that found in §11 of the 1933 Act. If, on the other hand, it had intended to limit liability to willful and intentional misrepresentation, it could have used language similar to that found in §9(e) of the 1934 Act, 15 U.S.C. §78i(e) (making liable any person who "willfully participates" in the sale of securities, *inter alia*, through use of materially false or misleading statements, §9(a)(4)). The words "manipulative," "deceptive," and "fraudulent," as applied to statements or omissions, seem to have been intended to have a meaning similar to that later ascribed to them by the Commission, which has defined misleading statements or omissions as those "made with knowledge or reasonable grounds to believe that [they are] untrue or misleading," 17 C.F.R. §240.15c 1-2(b).

When §§10b and 14(e) are viewed against the entire background and purpose of the securities laws, the *scienter*

requirement would be satisfied upon a showing that the person charged knew the material facts misstated or omitted and could reasonably have been expected to appreciate their significance, see *Heit* v. *Weitzen,* 402 F.2d 909, 914 (2d Cir. 1968), or, if he did not know them, that he had reasonable cause to believe that there might be a material failure in disclosure and yet did not ascertain and disclose the facts even though he could have done so without any undue effort. In short, the *scienter* requirement would be met if the corporate officer (1) knew the essential facts and failed to disclose them, or (2) failed or refused, after being put on notice of a possible material failure in disclosure, to apprise himself of the facts under circumstances where he could reasonably have ascertained and disclosed them without any extraordinary effort.

In keeping with the broad remedial aims of the anti-fraud provisions of the federal securities laws such a standard of responsibility, while requiring proof of more than mere negligence, would not permit top corporate officers and those aiding and abetting them to escape liability by pleading ignorance where it can be shown that red flags putting them on notice or providing warning signals of either undisclosed or misrepresented facts of a material nature were readily apparent to all and that a routine check would have disclosed the misrepresentation. Such a test would also serve to differentiate §§14(e), 10(b) and Rule 10b-5 and §17(a) of the 1933 Act, 15 U.S.C. §77q, see *SEC* v. *Texas Gulf Sulphur, supra* at 867 (Friendly, Ch. J., concurring), on the one hand, from other provisions of the securities acts, such as §§11, 12(1), 12(2), 15 U.S.C. §§77k, 77l(1), (2), which impose upon persons charged the burden of proving "due diligence," see *Escott* v. *Barchris Construction Corp.*, 283 F. Supp. 643, 682-703 (S.D.N.Y. 1968).

Since the defendants in the present case had knowledge of the material facts misstated or omitted or had sufficient

notice of possible misstatements and could reasonably have ascertained the facts with a minimum of effort, the proof clearly satisfies the standard.

The majority opinion gives lip service to the foregoing test but adds a series of qualifications and characterizations that in my view are unnecessary and only serve to cast doubt upon the standard itself. The effect is to compound existing confusion as to the law in the area. Starting with the view that proof of *scienter* requires a showing of "culpability" the main opinion translates that term into "knowing or reckless failure" to ascertain and disclose those facts as to which the person sued has a "duty of disclosure." With respect to the nature and extent of this duty, we are provided with uncertain and apparently conflicting guidelines. Although the duty is described as one which requires the corporate officer to "act reasonably in discovering facts material to the [exchange] offer," *ante* at 38, that statement is promptly qualified by observations to the effect that "corporate officers have a reasonable area of discretion in determining how far to explore the facts and in deciding what facts need to be disclosed," *id.*, and that they must be allowed "considerable room" for such discretion, *supra,* n.22. With these latter comments I must respectfully disagree. In my view the test of materiality which was adopted by this court in *List, Heit* and *Texas Gulf Sulphur,* remains an objective one. If the corporate officer has knowledge of facts that are material according to that test, he cannot in his discretion decide not to disclose them without facing liability under §14(e).

Reliance

On the subject of what proof of reliance is required to establish causation, the Supreme Court has spoken definitively in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), and in its sequel, *Affiliated Ute Citizens* v. *United*

States, 406 U.S. 128 (1972). In *Mills* minority shareholders of Electric Auto-Lite brought a derivative and representative class action challenging that company's merger with Mergenthaler Linotype Company on the ground that stockholders' approval had been obtained by means of a materially misleading proxy statement in violation of §14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78n(a), and SEC Rule 14a-9. The alleged omission was the failure of defendants, who controlled 54% of Auto-Lite's voting shares and needed a two-thirds majority for approval of the merger, to disclose that they were nominees of Mergenthaler. The district court's award of summary judgment to the plaintiffs was reversed by the Court of Appeals on the ground that causation had not been established. The Supreme Court, in a characteristically lucid opinion by Justice Harlan, who spoke for a unanimous court, reversed the Court of Appeals, holding that where the "proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction," 396 U.S. at 385, proof of actual reliance on the material misstatement or omission need not be adduced. This principle was later summarized by Justice Blackmun in *Affiliated Ute Citizens, supra,* as follows:

> "Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. See *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375, 384 (1970); *SEC* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833, 849 (CA2 1968), cert. denied *sub nom. Coates* v. *SEC,* 394 U.S. 976 (1969); 6 L. Loss, Securities Regulation 3876-3880 (1969 Supp. to 2d ed. of Vol. 3); A. Bromberg, Securities Law, Fraud—SEC Rule 10b-5, §§2.6 and 8.6 (1967). This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact. *Chasins* v. *Smith, Barney & Co.,* 438 F.2d at 1172." 406 U.S. at 153-54.

In short, whatever may have been our earlier views as to the necessity of adducing positive proof of reliance, see, e.g., *Green* v. *Wolf Corp.,* 406 F.2d 291, 301 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969), the gravamen of the offense is now the material misrepresentation itself, from which reliance by a reasonable investor may be inferred as a matter of law, thus rendering unnecessary proof of actual subjective reliance. The rationale behind this doctrine is that it "will avoid the impracticalities of determining how many votes were affected, and, by resolving doubts in favor of those the statute is designed to protect, will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions." 396 U.S. at 385.

The main opinion, following the lead of Judge Adams in *Kohn* v. *American Metal Climax Inc.,* 458 F.2d 255, 290 (3d Cir. 1972), construes *Mills-Ute* as creating a "*presumption*" of reasonable reliance "where it is logical to presume that reliance in fact existed." I disagree with this interpretation of the Supreme Court's decisions on the subject. At no point did that Court expressly or impliedly speak in terms of a "presumption." Use of that term naturally raises further questions: Is the presumption to be conclusive or rebuttable? If rebuttable, should not BPC be given an opportunity in the present case to rebut the presumption by offering proof that the percentage of Piper shareholders who did not rely upon its alleged

misrepresentations in tendering their shares was sufficient to enable BPC to achieve control? See Note, *Causation and Liability in Private Actions for Proxy Violations,* 80 Yale L.J. 107, 135-38 (1970).

In my view, unless reasonable reliance is found as a matter of law on the basis of the material misrepresentation, the Supreme Court's purpose in *Mills-Ute,* which was to avoid the impracticalities of determining how many votes or decisions to tender were affected, would be undermined. The door would still be open to extensive discovery and protracted proceedings aimed at establishing subjective non-reliance. The Supreme Court's decision not to remand for introduction of such proof in *Mills* or *Ute* indicates that it established a rule of law rather than a "presumption." Moreover, *Ute,* which involved 10b-5 claims, refutes the distinction relied on by Judge Adams in *Kohn, supra* at 289, that different standards of reliance and causation may be applicable to claims under §14(a) as opposed to those under §10(b).

In the present case BPC needed all but approximately 1% of the 7% gained as a result of its exchange offer in order to achieve its 51% control. Proof of non-reliance by all but 1% of the tendering Piper shareholders would be most unlikely. However, the main opinion, *ante* at 43, by obligating CCI to "show that there was a misrepresentation upon which the target corporation stockholders relied and that this was in fact the cause of CCI's injury" and by stating repeatedly that reliance will be "presumed," virtually invites an application for rehearing and remand to try the issue of reliance. I would clarify that issue now.

For these reasons my concurrence is based simply upon the view that, according to the principles established by the Supreme Court in *Mills* and *Ute,* CCI has established reliance as a matter of law in the present case.

BPC's Violations of Rule 10b-6 of the 1934 Act

In its denial of preliminary injunctive relief this court held that BPC's cash purchases of 120,200 Piper shares violated Rule 10b-6. *Chris-Craft Industries, Inc.* v. *Bangor Punta Corp.,* 426 F.2d 569, 576-77 (2d Cir. 1970) (*en banc*). We there found Rule 10b-6 applicable to purchases of a target corporation's shares since such purchases might have a bullish radiating effect upon a pending exchange offer.

I concur in the view that since BPC's unlawful purchases of Piper shares enabled it to gain control of Piper, its conduct is actionable at the instance of CCI, which was thereby handicapped in its lawful competition for control. However, I cannot agree with the main opinion's view that BPC's purchases actually "operated in the market to make BPC's exchange offer deceptively attractive." There was no such proof. Nor do I accept the view that liability should be predicated upon the *"presumption"* that "Piper shareholders . . . were deceived" or that the "illegal purchases will substantially inflate" the price of the exchange offer. Unless the presumption were conclusive, BPC would be entitled to rebut it by offering proof that its cash purchases did not have any radiating effect upon the exchange offer.

For these reasons my concurrence is based solely on the ground that where a party acquires control of a target corporation through violation of applicable provisions of the securities acts and regulations promulgated thereunder (in this case Rule 10b-6), it is liable as a matter of law to a competitor for any damages caused by the illegal conduct.

The Piper Family Defendants

I concur in the conclusion that the Piper family defendants did not become liable to CCI by virtue of their participation in the May 8th press release announcing the BPC exchange offer. The statement of predicted value contained

in the release was not a material representation since the specific terms were contained in the registration statement filed shortly thereafter and the actual value of the package appeared as soon as the exchange offer became effective. I therefore find it unnecessary to decide whether a reasonable investor would have construed the $80 promised value to refer to market price of the security or to an appraisal of BPC's assets and earnings, or whether the archetypical investor should have been expected to make this differentiation from the bare words of the press release.

I also concur in the majority view that CCI has not proved its claim based upon the letters sent by the Piper family to Piper shareholders in June and July, 1969. Although these letters failed to mention the arrangement with BPC whereby the Piper family might gain a huge profit if BPC succeeded in acquiring control of the Piper Company, CCI promptly furnished the essential information to all Piper stockholders on June 16, 1969, before the BPC tender offer became effective. In view of the latter communication no reasonable investor would have accepted BPC's tender offer, which went into effect on July 18, 1969, in reliance upon the Piper family letters.

I must dissent, however, from the majority's failure to accord similar treatment to the claim based on the earlier letters written by the Piper family to Piper stockholders on January 27 and 28, 1969, and to the January 29 press release. I agree that these letters and press release were materially misleading and that a reasonable investor would have considered them important in deciding whether to accept or reject CCI's cash tender offer. Under the *Mills-Ute* test positive proof of reliance was unnecessary to establish causation. However, proof of damages is a separate question and requires more. As the Supreme Court stated in *Mills* v. *Electric Auto-Lite*, *supra* at 388-89:

> "On the other hand, where, as here, the misleading aspect of the solicitation did not relate to terms of the merger, monetary relief might be afforded to the shareholders only if the merger resulted in a reduction of the earnings or earnings potential of their holdings. In short, *damages should be recoverable only to the extent that they can be shown.*" (Emphasis supplied)

Applying this principle, CCI must show that it suffered some resulting loss. This it has failed to do. In making the January cash tender offer it agreed to purchase up to 300,000 Piper shares if tendered by February 3, 1969, and the district court found that it was not seeking more. 304,606 shares were tendered and purchased by CCI. Thus CCI exceeded its goal. It got more shares than it agreed to buy. No loss was suffered. Indeed it publicly stated that the cash tender offer had been a success.

Although CCI reserved the right to purchase more than 300,000 shares, it did not have sufficient funds to purchase any significant amount in excess of 300,000. Nor had "financing for . . . shares in excess of 300,000 . . . been arranged. . . ." (Testimony of C. Leonard Gordon, CCI's Vice-President and General Counsel). It is true that Mr. Gordon testified that Burnham & Co. would have provided additional financing if more than 300,000 shares had been tendered. However, the record shows conclusively that CCI's chances of obtaining such a loan were negligible, due to a restrictive agreement in effect with its senior noteholders and the prohibitive cost of borrowing additional funds.

Under its agreement with its senior noteholders CCI had obligated itself not to have any unsecured current debt for bank loans in excess of a $15,000,000 revolving line of credit already obtained from the Philadelphia National Bank. The parties have stipulated that on February 3, 1969, the entire proceeds of this $15 million loan were re-

ceived by CCI and used by it to pay for Piper shares received by it on its January 24, 1969, cash tender offer, which closed on the same date the loan proceeds were received. (App. 825A). By February 4, 1969, CCI had purchased 540,000 shares of Piper stock at a cost in excess of $30,000,000. Its cash resources were virtually exhausted. Yet it did not seek waivers from its senior noteholders to permit additional borrowing. Indeed, the parties have further stipulated that no resolution authorizing CCI to borrow money or obtain credit from any other source to purchase Piper stock was ever sought or adopted. (App. 284A).

The reason for CCI's failure to seek additional loans was made clear by testimony of Mr. Woudhuysen, a partner of Burnham & Co., that the borrowing terms would have involved an 8¾% interest rate plus the issuance of 22,500 CCI warrants, exercisable at the market price of CCI common stock, for each million dollars borrowed on a two-year loan. Thus if CCI should borrow $20 million on such a two-year loan the total cost of the money, calculated according to a commonly accepted formula, would have been a staggering 43.11%!

In summary, having "shot its bolt" in the financial sense by early February 1969 CCI was thereafter relegated in its quest for control of Piper to the use of exchange offers. It was in no position to purchase for cash any appreciable amount of Piper shares over and above the 304,606 tendered in response to its initial cash offer. Indeed, although additional Piper shares were available in the market after the expiration date of CCI's tender offer, some at less than $65 per share,[3] CCI purchased only 9,100 shares between

[3] The Piper family January letters and press release regarding the Grumman transaction did not cause an increase in the market price of Piper shares. On the contrary the price declined from 64¼ per share on January 28 to 59⅝ on February 3.

February 3, 1969, and April 7, 1969, when the SEC advised it that such cash purchases during the pendency of its exchange offer (for which it had filed its Form S-1 with the Commission on February 27, 1969, to become effective May 15, 1969) would violate Rule 10b-6. The record further reveals that although Herbert Siegel, Chairman of the Board of CCI, knew as early as February, 1969, that Cornfeld's Fund of Funds Proprietary Fund, Inc. owned a large block of 78,600 Piper shares (later purchased by BPC), CCI made no effort to purchase it. Nor can CCI's lack of pursuit of the substantial Cornfeld block be attributed to a hypothesized desire to avoid the expense of searching out and purchasing small blocks of shares, as the main opinion suggests.

By March 19, 1969, when the Grumman deal collapsed, any possible effect of the Piper family's January 29, 1969, Grumman press release was completely dissipated, and by April 7, 1969, when the SEC took the position that further cash purchases were prohibited by Rule 10b-6, CCI could no longer claim that the January letters inhibited its purchase of Piper shares. By May 8, 1969, when BPC announced its tender package valued at $80, CCI could no longer contend that the Piper family's statement that Piper shares were worth more than $65 per share was misleading. Nor is the main opinion's fanciful assumption that the January letters "undoubtedly . . . influenced" Piper shareholders against accepting CCI's later *exchange* offer by casting a general pall of unfairness over CCI's reputation anything more than rank speculation.

Dogged by its inability to obtain financing that would have enabled it to purchase available Piper stock for cash in competition with BPC, CCI's efforts to obtain control by the cash offer route were doomed to failure. By the close of its second exchange offer on August 4, 1969, CCI owned 41% of Piper's outstanding shares as compared with

45% owned by BPC. Thereafter it was BPC's cash purchases in the open market of 100,614 shares, as compared with CCI's capacity to buy only 29,200 shares, that won control for BPC.

Thus there has been a complete failure to show that the Piper family's January letters and press release, which form the sole basis for the majority's decision holding liable the Piper family defendants, caused any damage to CCI. The record is clear that the Piper communications, unlike the misleading statements in BPC's exchange offer or BPC's cash purchases in violation of Rule 10b-6, did not deprive CCI of a fair opportunity to compete in the contest for control or enable BPC to win that contest.

In short, since the record shows that CCI did not suffer any damages as a result of the Piper family's communications, I would affirm the dismissal of CCI's claim against the members of that family.

First Boston and its Officers

Where an underwriter participates in an exchange offering by assisting in the preparation of the registration statement and prospectus and by lending its name to the offer, I agree that §14(e) should be construed to impose upon him the same obligation as that imposed upon the issuer with respect to materially false or misleading statements or omissions, and that a damage suit should lie against the underwriter in favor of the competing bidder for control who suffered resulting damage. This conclusion is based solely upon the principle of implying liability as a means of promoting private enforcement of the antifraud provisions of the securities laws. See pp. 2-4, *supra*. However, unlike the main opinion on this issue, I gain no assistance in reaching that decision from §11(b) of the 1933 Act, 15 U.S.C. §77k(b) or from the Senate Report

accompanying §14(e), S. Rep. No. 510, 90th Cong., 2d Sess. (1968).

Since §11(b) *expressly* creates liability for materially misleading statements in a prospectus and then only in favor of purchasers of the security, I fail to find it of any help in *implying* liability under §14(e) in favor of nonpurchasers. Indeed it could be argued that the very fact that Congress expressly delineated the scope of liability in §11(b) militates against implying liability in §14(e). As for the Senate Report accompanying §14(e), I believe the authors would be startled to find that they had in mind underwriters such as First Boston Corp. when they referred generally to persons "engaged in making . . . tender offers or otherwise seeking to influence" the decision of investors with respect to such offers.

Injunctive Relief

I concur in the well-reasoned opinion of Judge Gurfein affirming the district court's denial of injunctive relief against violation by BPC of the Securities Act of 1933, 15 U.S.C. §77a, *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. §78a, *et seq.* 331 F. Supp. 1154.

The dissent's description of BPC's conduct as "most flagrant," its characterization of the district court's action as an "abuse of discretion," and its portrayal of our decision as a "mischievous precedent," simply ignore undisputed contrary findings of fact, which are fully supported by more than ample credible evidence. Such comments sacrifice controlling evidence and governing legal principles to insatiable zeal for use of an unjustified remedy, all in the name of vigorous enforcement of federal securities laws.

A review of the claims, evidence and findings demonstrates the wisdom of allowing Judge Pollack's decision denying injunctive relief to stand. The Commission's claim

was that BPC's registration statement and prospectus were materially deficient because of an alleged failure to disclose that it had decided to sell BAR at a price some $13.4 million below the figure at which it was carried on BPC's financial statements, and that BPC deliberately deferred the closing of the sale until its exchange offer was completed in order to avoid making the writedown that would be required if the sale were completed prior to or during the pendency of the offer. After receiving extensive proof on these issues, including the testimony of key witnesses who were personally observed and whose credibility was appraised by Judge Pollack, whose experience in the field of securities litigation at least matches if not exceeds that of this panel, he found that during the period when BPC's registration statement and prospectus were in effect (i.e., from July 18, 1969 to August 27, 1969) no decision to sell had been made.[4] However he further found that although there was no intent to mislead on the part of BPC in carrying BAR at $18.4 million on the balance sheet, that figure was obsolete to the point of being misleading and should have been qualified by reference to pending negotiations for sale at a substantially lower figure.[5] These crucial

4 "The Court has found that as of these dates Bangor Punta had not reached a decision to sell. The Commission's charge that the sale was a reasonable probability is made from the vantage point of hindsight. In the total perspective of events preceding the sale—including the last-minute attempts to convert it into a sale of assets—the Court cannot find that the sale was a reasonable probability at the time and to the people involved." (331 F. Supp. at 1160-61).

5 "The essential question is whether, despite the non-existence of intent or of reasonable probability, the circumstances surrounding the sale were such as to indicate that the $18.4 million carrying figure of the BAR holding was obsolete to the point of being misleading. The Court finds that it was—absent full disclosure of the factors affecting the ultimate decision to sell the BAR interest at a figure of $5 million—or even $7 million—and regardless of whether the sale was to be of stock or of assets.

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findings, supported by substantial evidence, cannot be rejected by us.

> "Our court is not disposed to overturn conclusions of the trier of facts which are based upon substantial evidence and upon a determination of the credibility of witnesses who have given conflicting versions of the facts. N.L.R.B. v. Chain Service Restaurant Employees, 302 F.2d 167, 171 (2 Cir. 1962); Wilson v. United States, 229 F.2d 277, 279 (2 Cir. 1956); Phelan v. Middle States Oil Corp., 220 F.2d 593, 598 (2 Cir.), cert. denied sub nom. Cohen v. Glass, 349 U.S. 929, 75 S.Ct. 772, 99 L.Ed. 1260 (1955). Moreover, where a trial has been had by a judge without a jury, the judge's findings must stand unless 'clearly erroneous.' Fed.R.Civ.P. 52(a), 28 U.S.C." *Heyman* v. *AR. Winarick, Inc.*, 325 F.2d 584, 589 (2d Cir. 1963).

The dissent reluctantly concedes that the foregoing findings are supported by substantial evidence and confirms, in accordance with our decision in *SEC* v. *Manor Nursing Centers Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972), that in deciding whether to grant the extraordinary remedy of injunctive relief the district judge is vested with "broad discretion," which may be set aside only upon a clear showing of abuse of discretion. *United States* v. *W. T. Grant*

"I find that Bangor Punta did not intentionally or purposefully mislead Piper Aircraft stockholders or the investing public by the omission to make disclosure of the sale under consideration nor did Bangor Punta or its directors intend to gain an advantage over Chris-Craft by the nondisclosure in the contest being waged for control of Piper. There was no purposeful connection between the nondisclosure and the contest for control. In other words, the nondisclosure was not prompted by an improper purpose. However, absence of bad faith does not excuse the failure to include facts necessary to render the statements in the registration statement and prospectus not misleading." *SEC* v. *Bangor Punta Corp.*, 331 F. Supp. 1154, 1161 (S.D.N.Y. 1971).

Co., 345 U.S. 629, 633 (1953); *SEC* v. *Culpepper*, 270 F.2d 241, 249-50 (2d Cir. 1959); *SEC* v. *Torr*, 87 F.2d 446 (2d Cir. 1937); *SEC* v. *Okin*, 139 F.2d 87, 88 (2d Cir. 1943); *SEC* v. *Universal Service Ass'n*, 106 F.2d 232 (7th Cir.), *cert. denied*, 308 U.S. 622 (1939); *SEC* v. *Pearson*, 426 F.2d 1339 (10th Cir. 1970). However the dissent seeks to avoid these time-honored basic principles by suggesting that we may invoke a less stringent standard of review when the appeal is from *denial* of injunctive relief rather than from *grant* of such relief, relying upon *NMU* v. *Commerce Tankers Corp.*, 457 F.2d 1127 (2d Cir. 1972), which dealt with relief against unfair labor practices. That case is clearly distinguishable and has no application here. There we expressly noted that in deciding whether injunctive relief pending final adjudication by the NLRB in unfair labor practice cases is appropriate under 29 U.S.C. §160(1), "the role of the district court . . . is not to determine whether there has in fact been a violation of the Act but rather to determine whether the Regional Director could have *reasonable cause to believe* that the unfair labor practice charged had been committed and that its continuation ought to be enjoined." *Id.* at 1133 (emphasis in original). No such considerations control here, where a showing must be made that the person charged "is engaged or about to engage in any acts or practices which constitute or will constitute a violation," 15 U.S.C. §§77t(b), 78u(e).

We have found no instance where the standard for review of unfair labor practice suits has been applied to a suit by the SEC. On the contrary, in affirming the denial of injunctive relief in a suit by the SEC, the Tenth Circuit has taken the opposite view:

> "We are obliged to give great weight to the supported findings including the trial court's conviction that appellee did not intend further participation in the stock brokerage business in which he had not engaged for over a year before the hearing. See S.E.C. v. Franklin Atlas Corporation, supra 171 F. Supp. at 718. While we are persuaded that certain findings were clearly erroneous, we cannot say that there is a showing of abuse of the trial court's discretion in denial of the preliminary injunction and affirm that ruling." *SEC* v. *Pearson*, 426 F.2d 1339, 1344 (10th Cir. 1970).

With respect to the contention that Judge Pollack applied an erroneous standard in determining whether an injunction should issue, we would be engaging in petty semanticism if we were to reverse his decision because of his use of the words "propensity or natural inclination" instead of the phrase "reasonable likelihood that the wrong will be repeated." There is nothing magic about either phrase, as was recognized in *SEC* v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1101 (2d Cir. 1972), where this court, referring to Judge Pollack's use in this very case of the terms "propensity or natural inclination to violate the securities laws," said: "In relying upon our decision in *Texas Gulf Sulphur*, which applied the reasonable likelihood standard, the district court demonstrated that it was not purporting to apply a new standard for the issuance of an injunction." I am not persuaded by the dissent's present attempt to explain away this earlier view of the standard adopted by Judge Pollack. Although there is a slight difference between the two clauses, both express substantially the fundamental condition precedent to the issuance of the extraordinary remedy of a permanent injunction, i.e., that there must be a showing of a cognizable risk of future violation, something "more than the mere

possibility which serves to keep the case alive." *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953).[6]

Nor was injunctive relief denied merely because of lack of wrongful intent. Judge Pollack expressly recognized (*supra* n.5) that absence of bad faith or of an intent or purpose to violate the securities laws will not necessarily excuse the defendant and that an evil intent need not be shown to grant relief. But the lack of such intent is an important factor to be considered by the court in assessing the risk of future violations. One who intentionally violates the law or shows a willful disregard for it is usually a poorer risk than one who acts without a full appreciation for the seriousness of his conduct. In addition, however, the court must weight all of those considerations which have been the traditional concern of the courts of equity, including the nature and extent of past violations, the effect on the public interest, and the impression on the trial judge made by the defendants who testified. *SEC* v. *Harwyn Industries Corp.*, 326 F. Supp. 943, 955-58 (S.D.N.Y. 1971).

The $18.4 million ascribed to BAR as "stated book value" on BPC's financial statements was an obsolete and hence misleading figure in view of pending negotiations for sale of the railroad at a much lower price. Some caveat or reference to the negotiations was required. However, I cannot agree that BPC's failure to furnish additional data was "flagrant." This characterization ignores the fact that under generally accepted accounting principles "stated book value" may properly be used in a financial statement

6 It appears to have been the SEC in its brief that first used the phrase adopted by Judge Pollack, "Because of this demonstrated propensity for violating the securities laws, the scope of the injunction against Bangor Punta should be broad," etc. Brief, p. 16, citing *SEC* v. *Raffer*, 1969-1970 CCH Fed.Sec.L.Rep. ¶92,632 (S.D.N.Y. 1970). It was this standard put forward by the Commission to which Judge Pollack was evidently responding below. 331 F. Supp. at 1162-63.

and is not viewed in the financial world as the equivalent of market value. A person able to read a balance sheet would probably have recognized that such "historical" cost did not necessarily represent current liquidating value. Furthermore, to write down the figure immediately to $5 million might have been treated by the SEC as speculative and possibly misleading, in view of the other forms of disposition of BAR that were still under consideration.

The other alleged "past violation" chargeable against BPC—that its May 8, 1969 press release constituted an offer to sell before any registration statement had been filed—constituted at most a technical violation. BPC filed its registration statement and preliminary prospectus shortly after the May 8th release and in consenting to a permanent injunction it did not admit any of the allegations of the complaint filed against it in the District Court for the District of Columbia.

Nor can I agree that BPC should be singled out for special injunctive treatment because it is a conglomerate. There is no evidence to support the view that it has "long been interested in new acquisitions" or that it will "become involved in similar tender offers in the future." We are not concerned here with a corporate behemoth of the size of ITT but with a corporate venture of relatively modest size. Even if BPC should become interested in further lawful acquisitions for what it conceives to be sound economic reasons, the totality of the circumstances do not indicate any likelihood that it will engage in further violations of the securities acts.

Aside from the foregoing factors I am convinced that a judgment which (1) awards compensatory damages to CCI, (2) bars BPC from voting its illegally acquired Piper shares, and (3) awards rescission to former Piper stockholders who exchanged their shares in response to BPC's tender offer, amply protects the public interest and insures

against any reasonable likelihood that BPC will engage in similar conduct in the future.

The relief granted is bitter medicine which will be far more effective than a blanket injunction in deterring infraction of the law.

United States District Court

SOUTHERN DISTRICT OF NEW YORK

CHRIS-CRAFT INDUSTRIES, INC., *Plaintiff*, *v.* PIPER AIRCRAFT CORPORATION, *et al.*, *Defendants.*	69 CIV. 2227 (MP)

OPINION

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POLLACK, *District Judge:*

The Context of the Case

This case and its companion cases[1] arise out of the unsuccessful attempt of Chris-Craft Industries, Inc. (Chris-Craft), a diversified manufacturer of recreational products, to secure control of Piper Aircraft Corporation (Piper), a leading manufacturer of light aircraft. The Chris-Craft takeover attempt was resisted by Piper and by a competitor for the control, Bangor Punta Corporation (Bangor Punta), which eventually succeeded in acquiring more than 50% of the outstanding Piper shares. The bulk of Chris-

[1] *Bangor Punta* v. *Chris-Craft*, U.S.D.C. S.D.N.Y., 69 Civ. 2354 (MP), which is being decided this day; and *SEC* v. *Bangor Punta, et al.*, 331 F. Supp. 1154 (S.D.N.Y. 1971) (Pollack, *J.*).

Craft's complaints is based on charges that Bangor Punta's success was achieved and Chris-Craft's failure and its asserted damages were caused by deception of the Piper shareholders and of Chris-Craft in violation of various provisions of the federal securities laws and regulations.

Only a minor segment of the case involves charges that Chris-Craft was directly deceived by Piper. The balance of the case deals with charges of deceptions alleged to have been committed by Piper and Bangor Punta on public holders of Piper stock to induce them not to accept Chris-Craft's offers to acquire their stock by purchase or exchange. Chris-Craft claims also that Bangor Punta privately acquired three critical blocks of Piper stock during the pendency of an exchange offer in violation of an SEC Rule.

The contest for control of Piper was sophisticated and hard fought. The contenders were men accustomed to the handling of vast sums of public capital, were assisted by skilled professionals and were themselves seasoned in corporate tactics. It is not hard to detect personal overtones which added some passion and urgency to the contest. In addition, the conduct of both sides invoked the attention of the SEC and the New York Stock Exchange.

Thus, neither side can approximate itself to the position of an average public investor for whose express benefit, in dealing with others of superior knowledge (or the capacity to gain it), skill and resources, the law was designed. The Court does not intend to imply that contests for corporate control are to be unmediated by standards properly applicable under common law, federal legislation or regulation. However, substantial justice cannot be done by mere mechanical application of standards evolved to correct the imbalances of knowledge, skill and capacity for self-

protection which so often occur in securities transactions between members of the public and professionals. Nor can the Court be indifferent to the ultimate source from which the damages are claimed, in effect. (See *infra,* 35-37).

The Major Events

Piper stock was listed on the New York Stock Exchange. There were 1,641,890 shares outstanding. Chris-Craft began purchasing Piper stock just before the end of 1968. By January 21, 1969 Chris-Craft had acquired 102,600 shares of Piper stock on the New York Stock Exchange. On the next day it increased its holdings by purchasing 101,100 shares at $65 per share from Technology Fund, a midwest-based mutual fund; this made Chris-Craft's holdings total 13% of the issue. The market for the stock was then in the low fifties. On January 23, 1969, Chris-Craft announced a cash tender offer for Piper shares of $65 per share and it obtained 304,606 shares through tenders. It also bought an additional 38,000 shares approximately bringing its holdings by February 3, 1969, to 547,106 shares, a number barely short of one-third of the shares outstanding, at a cost of $34,677,000.

The Piper management (in essence the Piper family), which held some 31% of the outstanding Piper stock, reacted to the Chris-Craft tender offer by a communication to shareholders late in January to dissuade them from accepting the Chris-Craft tender offer. One of its statements complained of by Chris-Craft was that the Piper management considered the Chris-Craft $65 tender price inadequate. Chris-Craft charges that this was a misleading statement, based on the facts that Piper's investment bankers, First Boston Corporation, had advised Piper that a $65 price was fair and, furthermore, that on January 29, Piper had announced an agreement to sell 800,000 unissued Piper shares to Grumman Aircraft Company at $65 per

share.[2] The Grumman agreement was not consummated and the additional shares were not issued.

On February 27, Chris-Craft filed with the Securities and Exchange Commission ("Commission") an S-1 registration statement as a step in a proposed offer of exchange of a Chris-Craft package of securities for Piper stock. (The statement did not become effective until May 15.)

On March 22, Piper issued 469,199 authorized but unissued shares to acquire control of two companies, viz., Southply, Incorporated and United States Concrete Pipe Company of Florida. Apart from increasing the number of shares outstanding, these acquisitions could make Piper less attractive to Chris-Craft since the Pipe Company was not in the recreational field and ownership of Southply, a speedboat manufacturer, might bring Chris-Craft into conflict with antitrust law. However, Piper rescinded both of these acquisitions within a short time. Piper had failed to comply with its listing agreement with the New York Stock Exchange by issuing such a block of shares before seeking the approval thereof of its stockholders. This omission led the Exchange to refuse the listing of the newly issued shares, to suspend trading in all Piper shares on the Exchange and to initiate delisting proceedings.

Following the rescission of both of these acquisitions, the Piper family revived negotiations with Bangor Punta, begun early in January, toward securing a defensive merger between Piper and Bangor Punta.

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[2] Part of the agreement, not mentioned in the announcement, was an option in Grumman to "put" the shares back to Piper after six months at Grumman's cost plus interest. Piper insists that the "put" was part of an overall understanding that the proposed sale was a step in a possible Grumman-Piper merger, failing which Grumman might not be interested in a holding of Piper stock. The "put" was described in Piper's application to list the additional shares on the New York Stock Exchange.

The discussions were fruitful. The Piper family agreed to exchange its 501,090 shares for a package of Bangor Punta securities and Bangor Punta agreed to use its best efforts to acquire a majority of the outstanding Piper shares. Pursuant thereto, on May 8, 1969, Bangor Punta and Piper issued a release which made the usual joyful announcement of a fitting marriage, stating that the Piper family would receive Bangor Punta securities for their Piper shares and containing the following potent message:

> Bangor Punta has agreed to file a registration statement with the SEC covering a proposed exchange offer for any and all of the remaining outstanding shares of Piper Aircraft for a package of Bangor Punta Securities to be valued in the judgment of The First Boston Corporation at not less than $80 per Piper share.[3]

Chris-Craft has attacked this release and has attacked also the registration statement referred to in the release. We deal later with those issues.

Bangor Punta entered the battle with several considerable advantages. It was sponsored by the management of Piper, it could look forward to the Piper family block[4] and, significantly, it alluded to a value figure of $80, exceeding

[3] Shortly after this release was issued, the Commission, deeming the release to be a gun-jumping offer by Bangor Punta, sought in the U. S. District Court for the District of Columbia an injunction to prohibit further similar releases before effectiveness of the Bangor Punta registration statement. Bangor Punta and Piper, without admitting any of the allegations, consented to the issuance of an injunction.

[4] One of the issues raised by Chris-Craft respecting Bangor Punta's acquisition of the Piper block relates to a guarantee by Bangor Punta to the Piper family that they would receive $80 for their stock if Bangor Punta acquired control. All parties agree that no similar guarantee inhered in the $80 value statement contained in the May 8 release.

Chris-Craft's cash tender offer and the values to be imputed to the Chris-Craft package. This was a serious blow to Chris-Craft. Accordingly, one day after Chris-Craft's exchange offer became effective, it added $10 to its package. Chris-Craft continued to acquire Piper stock until August, 1969, when it virtually ceased buying the stock. Through its succeeding exchange offers and together with its open market purchases, Chris-Craft had by then obtained 697,495 Piper shares, about 42%, while Bangor Punta, by early September, 1969, ended with slightly more than 50%. The contest for control was over except for the litigations questioning the actions of the parties along the way which has embroiled them in claims and counter-claims.

Chris-Craft's Status Under the Securities Exchange Act

Both sides have argued strenuously the question of Chris-Craft's standing to bring this action. Chris-Craft relies heavily on the language of the Court of Appeals in *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970), as precedent affording it status. Defendants rely on *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952) and related cases for the proposition that Chris-Craft has no right to sue.

Chris-Craft's claims fall into several categories, each requiring separate consideration of the question of standing to sue.

(a) Chris-Craft made purchases of Piper stock and claims to have acted on statements of Piper about its important product lines. Even though its purchases were not from Piper, it has standing to assert such claims. *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F.2d 963, 968 (2d Cir. 1969), *cert. denied*, 399 U.S. 909 (1970).

(b) Chris-Craft seeks damages from Bangor Punta claimed to have resulted from the purchase by the latter of three blocks of Piper stock, totalling 120,200 shares in May, 1969, during the pendency of their competing offers to Piper holders, in violation of SEC Rule 10b-6. Chris-Craft claims that these purchases enabled Bangor Punta to obtain majority ownership of Piper. It is held that Chris-Craft has standing to attempt to establish such a claim.

(c) Chris-Craft claims damages from the defendants on the charges that, during the pendency of Chris-Craft's attempt to take over Piper, Piper and Bangor Punta issued improper press releases and Bangor Punta filed a registration statement with material omissions and misstatements. Chris-Craft, which neither bought nor sold on the basis of the releases or registration, premises its standing to sue thereon on two grounds; one is an exception to the *Birnbaum* doctrine repeated in, *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F.2d 963 (2d Cir. 1969), *cert. denied*, 399 U.S. 909 (1970); the other is predicated on a recent amendment to the Securities Exchange Act of 1934.

The first theory is that Chris-Craft is in the position of a "forced seller" as a result of Bangor Punta's acquisition of a majority of Piper's stock. Chris-Craft emphasizes the decision of the Court of Appeals in *Crane Company* v. *Westinghouse Air Brake Company*, 419 F.2d 787, 797-98 (1969), *cert. denied*, 400 U.S. 822 (1970).

In *Crane* the Court of Appeals distinguished *Iroquois Industries, Inc. supra*, (decided by the Court of Appeals five weeks prior to *Crane*—with rehearing denied by the Court of Appeals on the very day on which the *Crane* opinion was issued) by pointing out that plaintiff in *Iroquois* (a disappointed contender for control) was neither a buyer nor a seller, whereas in *Crane*, the disappointed

contender was deemed a "forced seller". Chris-Craft claims to be a locked-in buyer which could sell only at a substantial loss, and that it could not under state law (Pennsylvania) resist a merger, should Bangor Punta, as majority holder, elect to effect one.

While the "forced sale" argument here rests on quite different grounds from those expressed by the Court of Appeals in *Crane*, Chris-Craft might be within the realm of reason in asserting itself to be a forced seller, should a merger of Piper be effected under Bangor Punta's control. However, no such merger has been proposed and the "forced seller" basis for standing to sue is in this case as compared with *Crane* of highly dubious validity.[5]

The second theory on which Chris-Craft relies for standing to assert the matters relating to the press releases and registration statement is that Section 14(e) of the Securities Exchange Act affords it a right of action. Section 14(e), 15 U.S.C. §78n(e), provides:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request

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[5] Crane Co.'s position as a forced seller was deemed to result from the fact that its target, by merging with a product competitor of Crane (Standard) made Crane an involuntary holder in its competitor and vulnerable to antitrust action. Crane thereupon sold out virtually all of the Standard holding acquired in the merger. It may be that one need not have looked beyond the merger itself to these special facts to deem Crane a forced seller. While the exchange effected in a merger has not been traditionally deemed by SEC to be a "sale" for registration purposes, it has been deemed a "sale" for purposes of invoking anti-fraud provisions.

> or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. *The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.* (Emphasis supplied).

This section was added to the '34 Act in 1968. The last sentence was added in December, 1970 (one year following the decision of the Court of Appeals, Second Circuit, in *Crane*).

In *Crane,* the Court of Appeals commented in dictum that Section 14(e) "should serve to resolve any doubts about standing in the tender offer cases, even where an offeror is not, as is *Crane,* in the position of a forced seller." 419 F.2d at 798-99. This comment may find support in *Electronic Specialty Co.* v. *International Controls Corp.,* 409 F.2d 937, 940 (2d Cir. 1969), where the target of a takeover bid, as well as that corporation's shareholders, were accorded standing to sue for alleged violations of §14(e) occurring in the course of a control fight. Judge Friendly stated that the amendment which produced section 14(e), "In effect . . . applies Rule 10b-5 both to the offeror and to the opposition" and added that "except perhaps for any bearing it may have on the issue of standing, [the amendment is] only a codification of existing case law."

The conclusions herein reached as to Chris-Craft's 10b-5 claims will be dispositive of the merits of any claim based on §14(e). Under the circumstances, the Court finds it unnecessary to decide whether §14(e) may be separately invoked by one competitor for corporate control against another.

1. Piper's shareholder letter and release of January 23, 1969.

(a) One of the attacks on these communications centers on the utterance by the Piper management of its view that the $65 Chris-Craft offer was inadequate. While the offer was some $13 above the current market price, it was considerably less than a Piper holder, biding his time, could have received at later stages of the contest.

Chris-Craft insists that the communications could not be read to refer to any inadequacy of the Chris-Craft offer other than in respect to price and—to establish Piper's bad faith and intention to mislead—it points out that

(1) Piper's own bankers had advised Piper that $65 per share was a fair price and

(2) the Grumman agreement contemplated a sale of Piper stock by Piper to Grumman at $65 per share.[6]

Any Piper shareholder with a telephone or a newspaper at hand could compare the current market for Piper shares with Chris-Craft's offer. Thus, if the Piper statement of the inadequacy of the offer were intended to refer to price only it would be more fatuous than misleading. The more rational view is that the statement referred and was or should be taken to refer to other factors—such as Piper's

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[6] We do not doubt that one of the reasons for the Grumman agreement was the effect its consummation would have on the number of shares outstanding and consequently on the number Chris-Craft would have to acquire to gain control. W. T. Piper, Jr. had no hesitancy in stating that the Grumman transaction "would give us additional shares" and that it "might make the . . . tender offer of Chris-Craft less attractive to our shareholders." A psychological effect may have been intended as well—to discourage Chris-Craft early in the game by facing it with the prospect of a heavier than anticipated commitment to the contest. As noted above, the shares were never issued.

management's views as to company prospects or as to the quality of Chris-Craft management, should Chris-Craft acquire control.

That Piper's management refrained in these releases from expressing fully its personal (and in all likelihood unflattering) opinions about Chris-Craft's management does not, in our opinion, fault the communications. And if the statements were intended to convey the impression that to resist Chris-Craft Piper's management would bend its efforts to procure a better alternative for Piper shareholders, the efforts were made and were, in terms of price to tendering shareholders, successful.

Chris-Craft makes the further assertion that it was itself, as a purchaser, misled by the announcement of the Grumman agreement. Chris-Craft claims that an indication that Grumman was willing to pay $65 (in the absence of disclosure of the "put"—see n. 2 supra) helped to justify its own decision to pay that much, indicated that Chris-Craft might have a willing buyer for its block, should it decide to unload, and led Chris-Craft to refrain from exercising its right to withdraw its offer if any material increase in outstanding Piper shares were proposed or made.

While the Court has no doubt that the Grumman agreement, the announcement and their timing were strategic moves, it cannot conclude that the agreement was a sham, or that the "put" provision was anything more than what Piper purports it to be—Grumman's "out" in the event that a Grumman-Piper merger did not materialize. These were all, under the circumstances, rational steps for the Piper and Grumman managements to take and the Court cannot hold that in taking its steps Piper had any special duty to warn Chris-Craft (by disclosing the "put" or otherwise) not to gather comfort from the agreement price of $65 and not to rely on Grumman as a possible dumping ground for its shares of Piper.

Chris-Craft admits that Piper described the "put" aspects of the Grumman agreement fully in its application to the New York Stock Exchange for listing of the additional shares. Chris-Craft's contention therefore that, despite its efforts to obtain a copy of the Grumman agreement, it did not learn of it until April, 1969 when two Chris-Craft representatives were elected to the Board is not worthy of belief and can evoke little more than the additional response that it could have been more sedulous than it was to protect its already heavy and growing investment in Piper.

But the fatal blow to Chris-Craft's credibility on this issue is its action after April, 1969 when it claims first to have discovered the "put" provisions of the Grumman agreement. Between April 1 and August 18, Chris-Craft acquired about 150,000 additional shares of Piper. On May 16 it added $10 to its exchange package to compete with Bangor Punta. Such behavior with knowledge of the facts is inconsistent with a claim that knowledge would have caused Chris-Craft to change its course. Plaintiff's reference to *SEC* v. *Great American Industries*, 407 F.2d 453 (2d Cir. 1968), *cert. denied*, 395 U.S. 920 (1969) (nondisclosure of finders' fees) is, under the circumstances, beside the mark.

(b) Chris-Craft has further criticized the communications for saying that Piper was in a growth industry and expected "to participate fully in this growth". The basis of its attack is in product problems faced by Piper in connection with a model then in development (Pocono) and one already on the market (Twin Comanche). These are discussed at greater length, *infra*. Here it is sufficient to point out that inherent in Chris-Craft's claim are the assumptions (1), that these problems would effectively prevent Piper from participating in the industry's growth—which it has not proved and (2), that this on-the-run re-

sponse of Piper's management to Chris-Craft's foray into the Piper stock is to be tested by the standards applicable to a registration statement—a view which this Court rejects.

Chris-Craft's contentions as to the January Piper communications and the Grumman agreement must be and are rejected as unfounded.

2. The May 8th Release

This release is one of Chris-Craft's principal targets. Chris-Craft asserts that the release was in violation of the registration and prospectus provisions of the Securities Act of 1933, especially § *5(c)* (15 U.S.C. § 77e(c)). This contention has the support of the SEC, which, in May, 1969, brought an action in the District of Columbia to restrain further releases of a similar character, with Bangor Punta consenting to a decree, and it has the support of the Court of Appeals of this Circuit, which held, in *Chris-Craft Industries, Inc.* v. *Bangor Punta Corporation,* 426 F.2d 569, 573-76 (2d Cir. 1970) that the release violated the registration requirements. The Court of Appeals nonetheless sustained the District Court's refusal to issue a preliminary injunction to prevent Bangor Punta from gaining and exercising control of Piper, but remanded the case for further proceedings.[7]

While the law of these injunction cases, as contended by Chris-Craft, may be that the May 8th release violated Sec-

[7] Four opinions were written. Judge Waterman wrote the majority opinion for a full court (with Judge Friendly not participating). Judge Moore uttered strong doubts as to the majority's rejection of Bangor Punta's claim that the release was in conformity with SEC Rule 135, 17 C.F.R. § 230.135. Judge Anderson, who concurred in the legal conclusions of the majority, expressed separate views as to the materiality of the $80 statement. Judge Lumbard (then Chief Judge) could find no substance in Chris-Craft's legal claims as to Section 5(c), 15 U.S.C. § 77e(c), or Rule 10b-6, 17 C.F.R. § 240.10b-6 (to be discussed).

tion 5(c) of the Securities Act, that by no means disposes of the issue in the damage suit here being adjudicated.[8] Since Chris-Craft was not a purchaser of Bangor Punta stock it has no standing to invoke the provisions of Section 11 or 12(2) of the Securities Act of 1933 (15 U.S.C. §§ 77k, 77l(2)) (material misstatements in or omissions from registration statements) or of Section 12(1) of the Act (15 U.S.C. § 77l(1)) (sales in violation of the registration requirements). The plaintiff's claim, to be actionable in this damage suit, must rest on other grounds.

As the Court of Appeals indicated, embodying the substance of the May 8 release in a full registration statement might have served to dispel possible erroneous interpretations of the release by those to whom it was addressed and

> "... would have eliminated the possibility, perhaps the probability, that some persons would have construed the $80 figure as referring to market value when that value was neither accurate nor intended." *Chris-Craft* v. *Bangor Punta,* per Waterman, J., 426 F.2d at 575.

[8] The issue in the "case" before the Second Circuit was whether an injunction should issue. The denial of an injunction was affirmed and it was left to the Trial Court to determine what, if any, consequences were to flow on remand from the views of the Court of Appeals as to the application of Section 5(c), 15 U.S.C. § 77e(c), of the Securities Act and Commission Rule 10b-6, 17 C.F.R. § 240.10b-6 under the Securities Exchange Act. The case before the District of Columbia Court was also one involving injunction, not damages, and Bangor Punta's consent to an order may well have been grounded on considerations other than the merits of the SEC's action. The "case" tried before this Court is radically different from the "case" considered on the appeal to the Second Circuit. Sometime after the decision on appeal, at a pre-trial hearing, Chris-Craft elected to abandon and announced the withdrawal of its claim for injunctive relief and stated that the plaintiff's sole claim was one for damages and accordingly that is the claim which is to be decided here.

It must be borne in mind that this is not an action by a former Piper shareholder who exchanged his stock for Bangor Punta securities, nor is it a suit for an injunction and equitable relief.

This is a case by a disappointed contender for control attempting to invoke a registration requirement designed for the protection of the public in order to obtain damages for itself because of a premature offer to sell. Yet Chris-Craft does not point to any damage to Piper holders occasioned by the premature release, nor has it adduced any evidence that the release was anything but true when taken in its own terms—as a statement that it was Bangor Punta's intention to offer a package which would be worth $80 in First Boston's judgment.[9] Even if the release were taken as a representation of future values, it should be noted that actual values reached by the Bangor Punta package were so close to $80 as to render any variance *de minimis*.[10]

Any claim of Chris-Craft that the violation of Section 5 *per se* induced enough Piper holders to accept Bangor Punta's offer to tip the balance of control in Bangor Punta's favor must be supported with proof that this resulted from the absence of the information which a full registration statement and prospectus would have contained. Chris-Craft has made no such showing. Moreover, a showing that the acquisition of a particular block was enough to give Bangor Punta control would not by itself constitute proof that control would have fallen to Chris-Craft if Bangor Punta had failed to acquire that particular block. While the delay which might have occurred in the processing of a full registration statement by Bangor Punta might have given Chris-Craft extra time to forage about for Piper stock while Bangor Punta was preparing its statement for filing, Chris-Craft has adduced no proof that it was disadvantaged in this regard. *Cf.* 426 F.2d at 573.[11]

Chris-Craft did respond to the May 8 release by raising its bid. Its cost of acquiring Piper stock was thereby directly and immediately increased. But everything in this record is consistent with the conclusion that Chris-Craft would have done the same thing even if the substance of the release had been embodied in a fully cleared prospectus. There is nothing in this record which shows that the release was, in intent or effect, false or misleading as to Chris-Craft or the public.[12] Any increase in Chris-Craft's costs occasioned by the release was occasioned by its substance and not by the absence of a registration statement.

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[9] The Court is familiar with instances in which exchange offers contemplate, and describe, formulas guaranteeing a market value for the securities to be given in exchange for the target company's stock. Such descriptions are common and leave no doubt as to their intentions. The language of the May 8 release could not be confused by reasonable men (much less professionals of the purported stature of Chris-Craft's witness on the point) with offers intending or implying guarantees of market value.

[10] Based on various alternative methods of valuing the Bangor Punta package in the week following July 23, five days after effectiveness of the Bangor Punta exchange offer, the Bangor Punta package had a high market value of $79.93 and a low of $73.37. By contrast, using the same bases, Chris-Craft's package in the period had a high of $75.50 and a low of $63.25.

[11] "We do not understand Chris-Craft to allege that prior misdeeds of Bangor Punta so determined the course of the competition for shares after the date of the decision below that Chris-Craft was placed at any real disadvantage."

[12] It must be borne in mind that the fact that a statement violates Section 5 of the Securities Act, 15 U.S.C. § 77e, does not necessarily connote that the statement is either false or otherwise misleading within the meaning of Rule 10b-5 upon which Chris-Craft relies. A thoroughly adequate disclosure—even a full registration statement—used in offers to sell before a required filing violates Section 5.

Chris-Craft fully understood what the release was meant to convey. Chris-Craft is not entitled in this suit to the recovery of damages under Rule 10b-5 for the violation of Section 5.

3. The Bangor Punta Registration Statement[13]

Chris-Craft complains of the Bangor Punta registration statement covering the package of securities it was offering in exchange for Piper stock, alleging that material falsity in the statement was part of the scheme to divert Piper holders away from Chris-Craft.

The principal attack is on the figure at which Bangor Punta carried its holdings (almost 100%) of the Bangor and Aroostook Railroad (BAR). Bangor Punta carried the BAR stock on its books at $18.4 million—an unconventional figure in terms of transactional accounting, and one with a checkered history.

Historical cost of the BAR stock, less depreciation and other accounting adjustments, was $29.8 million. In 1965, in view of a then possible sale of BAR, Bangor Punta wrote the asset down to some $8 million. That sale did not materialize and the carrying figure was again revised (this time upward) to reflect an $18.4 million valuation of the BAR investment by investment bankers. The book increase resulting from this revaluation was credited directly to earned surplus (bypassing the income accounts).

There is no dispute as to this series of adjustments. The $18.4 million carrying figure is, however, attacked as materially misleading in view of a sale of Bangor Punta's

[13] A fuller discussion of this issue is contained in this Court's opinion in *SEC* v. *Bangor Punta, et al.*, 331 F. Supp. 1154 (S.D. N.Y. 1971) (Pollock, *J.*). Only high-light facts are here discussed.

interest in BAR, at $5 million (and additional contingent consideration) which did occur in October, 1969, a few months following effectiveness of Bangor Punta's registration of its Piper exchange package.

Chris-Craft asserts that the agreement to sell the road at that figure existed earlier and should have been reflected in Bangor Punta's registration statement. The charge is that Bangor Punta postponed formal contract and closing to avoid having to reflect in its registration statement a book loss of $13 million on the sale.

In *SEC* v. *Bangor Punta*, n. 13 *supra*, this Court concluded that there was no substance in similar allegations by the SEC regarding the BAR matter. We held, however, that the registration statement was unintentionally in error in failing to disclose the circumstances which rendered Bangor Punta's carrying figure of the BAR holding obsolete and misleading absent such disclosure. An injunction against further violation of the securities laws was sought by SEC in that case but was denied. However, the Court ordered that shareholders who accepted the Bangor Punta exchange offer be given an opportunity to rescind their exchange should they elect to do so because of the registration error. This result expressed the principle that a registration statement with a misleading effect should be corrected for those to whom it related, whether or not the error was made with intent to mislead.

But that result does not conclude the issue here. This is not a suit by a Piper shareholder claiming to have been damaged by the error in respect to the BAR or any other matter pertaining to the registration. Chris-Craft did not rely on or purchase under the registration statement filed in connection with the exchange of Piper shares for Bangor Punta securities and, for the following reasons, we cannot

conclude that plaintiff merits, under the circumstances, any recovery under federal law on this branch of the case.

Chris-Craft's complaint with respect to the Bangor-Punta statement is not based on the provisions of the Securities Act expressly designed for such complaints. Secs. 11 and 12, 15 U.S.C. §§ 77k and 77*l*. It does invoke the broad provisions of Section 10, 15 U.S.C. § 78j and Rule 10b-5, 17 C.F.R. § 240.10b-5, under the Exchange Act, and of Section 14(e), 15 U.S.C. § 78(n)(e), under that Act. It thus presents us with the question whether and to what extent these general provisions can fairly be construed to override the more specific ones prescribed to implement private actions in complaint of registration statements.

We have no doubt that a violation of the registration requirements can, also, be a violation of Section 10b(5) and 14(e) of the Securities Exchange Act. But the mere fact of a violation of registration requirements under the '33 Act does not automatically trigger Section 10b and Rule 10b-5. The reasons and basis for invoking the '34 Act provisions must exist independently. The essentials are material deception, some form of scienter and a causal relation between the deficiency and the harm complained of. These essential elements have not been established in this case. At a minimum, neither a form of scienter nor proof of causal effect was established here.

Chris-Craft does not, in this Court's view, stand in the position of the plaintiff in *Mills* v. *Electric Autolite*, 396 U.S. 375 (1970) as being entitled to ask the Court to disregard traditional requirements that a causal connection be shown between the claimed violation and the injury. The attack in *Mills* was on a proxy statement which did not adequately disclose the true interest of directors who recommended a merger. This omission directly affected the shareholders on whose behalf the suit in *Mills* was

brought.[14] It was in that particular context that the Supreme Court deemed sufficient a set of facts under which shareholders *could* be misled.[15] This does not aid Chris-Craft as it is seeking to recover because of the effect which a misstatement allegedly had on third parties.

A Piper holder's decision to tender to Bangor Punta and Chris-Craft's failure to acquire the shares of such a holder cannot be held to be so clearly tied to the registration statement as to obviate the need for proof which would, at least, indicate a causal connection producing damage to Chris-Craft.

Chris-Craft was indeed a Piper shareholder. But it did not exchange any of its Piper shares for Bangor Punta. Its complaint is solely that of a defeated contender for control and it has asked this Court for a money award in the absence of evidence establishing a reasonable probability that its defeat and damage were connected with the claimed violations. There is no proof that a single exchanging Piper shareholder would have refrained from the exchange *and* taken an offer for his shares from Chris-Craft instead of that from Bangor Punta. In a damage suit, as distinct from one for equitable relief, such proof is essential to sustain a 10b-5 claim. In effect, Chris-Craft seeks the windfall of a punitive award against Bangor Punta by assuming the role of defender of the public

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[14] See *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 428 (1964), ("We consider only . . . whether § 27 of the Act authorizes a federal cause of action . . . to a *corporate stockholder* [arising from use of a misleading proxy statement]" (emphasis added)).

[15] "Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction." *Mills*, 396 U.S. at 385.

interest in the purity of the registration process. This role has already been assumed by the Commission and we could well expect it to be assumed by exchanging Piper holders if there were material harm to them.

Both *Crane* and *Mills, supra*, indicate that in a proper case "tendency to result" may be as good coin as "result" and "could" be as good as "did" in establishing a right of action. The evidence does not support a notion that the Bangor Punta registration statement presents such a case. Despite the language of *Crane*, the facts indicated that blatant manipulation (overt buying and covert selling) was used to "paint the tape" as Court of Appeals Judge Smith said. By this means a competitor for control (Standard) was able, on the crucial days of Crane's tender offer, to raise the price of target company (Westinghouse Air Brake) stock to a level which assured defeat of Crane's campaign. The character of the violation and the clear causal nexus were crucial to the *Crane* result. These characteristics have not been demonstrated here. In *Mills*, as pointed out *supra*, the suit was on behalf of and for protection of the class to which the proxy material was addressed and for which the proxy rules were designed.

Granting to Chris-Craft full standing to raise the issue of falsity in the Bangor Punta registration statement would, in this Court's view, permit it to do no more than it has done here—attempt to show what it has not been able to show, that as a matter of substance the claimed violations entitled it to money damages.

Nor does Section 14(e) in any way alter the result on the merits. Accepting, on its face, the dictum of the Court of Appeals in *Crane* that Section 14(e) "should serve to resolve any doubts about standing in the tender offer case, even where an offeror is not, as is *Crane*, in the position of a forced seller", 419 F.2d at 798, leaves open the questions of how the substantive standards of Section 14(e) are to be applied and what levels of proof are required to evoke their application.

Section 14(e) virtually tracks the language of Rule 10b-5, with certain notable exceptions, and our 10b-5 conclusions are dispositive of the issues as raised under Section 14(e). The differences in language are significant. Section 14(e) refers to "fraudulent or manipulative acts or practices" whereas Rule 10b-5 makes unlawful "any act, practice or course of business which operates *or would operate* as a fraud or deceit on any person" Rule 10b-5(c) (italics added), and contains a prohibition against employment of "any device, scheme or artifice to defraud", Rule 10b-5(a) (language not present in Section 14(e)). In the context of the facts of this case, Section 14(e) adds no weight to contentions of Chris-Craft that it need not establish a nexus between the violations it charges and the damages it claims to have suffered.

In addition to the charge of deficiency in the registration statement based on the BAR carrying figure, Chris-Craft has alleged the failure of the statement to reflect the terms of outstanding institutional loans, the relatively favorable treatment to members of the Piper family in the exchange (see n. 4 *supra*) and a guaranty to a group of Piper holders (the "Bolles" group), ostensibly for tax purposes, of a resale price for the Bangor Punta package of not less than 32½% of the value thereof at the close of the exchange. The Bangor Punta prospectus, while it did not pinpoint each of the alleged deficiencies made it more than amply clear that special treatment was being afforded by Bangor Punta to management personnel of Piper—so that the willingness of these large holders to effect the exchange for Bangor Punta may have been conditioned by their personal advantages as well as their views as to the best

interests of Piper. Thus Chris-Craft's charges, in essence that this motivation was not disclosed, resolve themselves into a dispute over adjectives. None of the registration errors, including the BAR item, went beyond mere negligent omission or misstatement of fact.

4. Application of Rule 10b-6

SEC Rule 10b-6 interdicts bids for or purchases of a security by or on behalf of the issuer of a security if the security is "the subject of . . . [a] distribution". Included in the prohibitions are bids for or purchases of "any right to purchase any such security."[16]

Bangor Punta made three block purchases of Piper shares during the pendency of its exchange offer. It purchased 78,600 shares from Fund of Funds Proprietary Fund, Ltd. (Proprietary) and two blocks, totalling 41,600 shares, from Bay Securities Corporation and American Securities. Chris-Craft claims that all three blocks were purchased in violation of the Rule. Bangor Punta claims the benefit of an exemption from the operation of the Rule for the purchase from Proprietary. Rule 10b-6(a)(3)(2), 17 C.F.R. 240.10b-6(a)(3)(ii)(1971).

The application of the prohibitory provisions of Rule 10b-6 is not before us for *de novo* decision. The Court of Appeals has ruled that Bangor Punta's purchases violated the first sentence of the Rule. However, it left open two vital questions to be decided on the remand. One is whether the exemption contained in paragraph (a)(3)(2) of Rule 10b-6 is applicable. The other is the determination of what remedy is appropriate.

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[16] There is no dispute that, under the circumstances of this case, Piper stock was, within the meaning of the Rules, a "right to purchase" Bangor Punta stock.

Paragraph (a)(3)(2) of Rule 10b-6 exempts

> unsolicited privately negotiated purchases, each involving a substantial amount of such security [in distribution], effected neither on a securities exchange nor from or through a broker or dealer.

As stated above, Bangor Punta claims an exemption from Rule 10b-6 only for the Proprietary block. A literal reading of the exemption requires a finding that the Proprietary purchase, like the others, was not exempted.

Proprietary's functions appear to have been solely to execute transactions for its associated mutual funds.

The Proprietary purchase followed a visit by a Bangor Punta executive with officials of Proprietary in Nassau, and it appears further that Bangor Punta made a payment of 75¢ per share to London & Dominion Trust Company, Ltd., which acted as nominee for Proprietary's Piper holding.[17] Absent any other cogent explanation for the visit the facts seem to point fairly at a solicitation of the purchase from Proprietary as the reason for the visit. It is so found.

The Court has searched for substance in the 10b-6 contention behind the technical violation, in the context of a claim for damages rather than in a suit for injunction.[18]

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[17] Chris-Craft claims that this was a commission payment. Bangor Punta asserts that it was a fee. Resolution of this issue is unnecessary. Commission payments are not prohibited by the exemption (except by implication from the exclusion of purchases through a broker). The status of the seller as a broker-dealer as well as the "solicitation" involved in the Nassau visit are in themselves enough to deprive the transaction of an exemption under a literal reading of paragraph (a)(3)(2) of Rule 10b-6.

[18] It has been suggested in some quarters that Rule 10b-6 is of doubtful application in cases such as the one at bar. The stock bought by Bangor Punta was Piper stock, not its own. Since it was

This search has not revealed such substance as to merit serious consideration of the charge as a basis for money damages.

Despite the failure of Bangor Punta's acts to match the literal prescriptions of the exemption, this Court cannot conclude that Chris-Craft has established any right to recovery under Rule 10b-6. Even granting that the block purchases resulted arithmetically in Bangor Punta's achievement of control, there is no basis for concluding that, absent Bangor Punta's acquisition of these blocks, Chris-Craft would have achieved its goal of control. Thus the record will not support a contention that Bangor Punta should, by reason of violation of Rule 10b-6, compensate Chris-Craft for the latter's failure to gain control of Piper.

1. Chris-Craft was not misled by the purchases of Piper stock effected by Bangor Punta during the "distribution" of Bangor Punta's stock in the Piper exchange. The primary purpose of Rule 10b-6 is to prevent bids or purchases

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embarked on a program of purchasing Piper and its self-interest would cause it to seek to do so as economically as possible, it would have no reason to stimulate demand by others for or inflate the price of Piper stock. Its motivation would, therefore, be to adhere to rather than violate the purpose of Rule 10b-6. While Piper stock and not Bangor Punta stock was being purchased, the purchases fell within the Rule because Piper stock was exchangeable for the stock being distributed—i.e., Bangor Punta stock. Any rise in Piper would in effect depress the value of Bangor Punta securities offered in exchange. But even if the price of Bangor Punta's securities were somehow being stimulated that rise would be of no avail to Bangor Punta in the exchange. For market arbitrage would almost immediately raise the price of Piper to align it with the rising price of the Bangor Punta securities offered in exchange.

These considerations, however, are foreclosed to this Court by the Court of Appeals which has found Rule 10b-6 to be violated and which remanded solely to have determined the question of the exemption and the appropriate remedy, if any, in the context of a suit demanding an injunction (which this no longer is).

by a distributor of securities which have a stimulating effect on the market. The Rule thus seeks to protect a potential buyer from paying a price for the security in distribution other than that set by untrammeled market demand or from being misled into believing that the market demand is wholly that of independent purchases. See *SEC* v. *Scott Taylor and Co.*, 183 F. Supp. 904, 907 (S.D. N.Y. 1959). Chris-Craft was not in that position. It knew that significant large blocks of Piper stock were in existence, that Bangor Punta was as anxious as Chris-Craft to acquire those blocks and that Bangor Punta's acquisitions (like its own) would place such blocks at a premium.

2. Was the public misled by Bangor Punta's acts? Here too there is not a scintilla of evidence that any Piper holder was misled. And the absence of such evidence may be explained by the fact that the acts of Bangor Punta here in question, while they did not comply with the literal terms of the exemption contained in paragraph (a)(3)(2) of Rule 10b-6, were nevertheless well within the spirit of that exemption. This is a root factor in determining whether the 10b-6 charge has real substance. For the exemption from the prohibitions of the Rule, in a vital sense, defines the basic purposes of the Rule by delineating the kinds of transactions which have little, if any, tendency to radiate a stimulating effect into the general market.

If we lay the transactions complained of against the intent behind the words of the exemption provisions it becomes clear that the block purchases fell within the intent of the exemption, if not within its words.

(i). Paragraph (a)(3)(2) requires that purchases, to be exempt, must be substantial. The obvious reason for this provision is to prevent fragmenting purchases in order to create the appearance of a spread of demand. There is

no dispute that Bangor Punta's block purchases were of a substantial nature. There is no evidence that Bangor Punta fragmented its purchases or otherwise acted to produce or heighten a stimulating effect on the market.

(ii). A distributor's solicitation of purchases, while distribution is in process, may have the same effect as purchases by the distributor. It may create an appearance of demand which is artificial in fact. However, while we have concluded that the visit of a Bangor Punta executive to Nassau was to solicit a sale to Bangor Punta by Proprietary, it was not solicitation calculated to have the effect condemned by the Rule. There is no evidence that it was broadcast, or that it was otherwise radiated into the general market where it might have had the prohibited stimulative effect. And, even if the payment of 75¢ per share to Proprietary's nominee bank were deemed to be part of the inducement to acquire the block, that fact does not change the local and unpublicized character of the entire Proprietary transaction.

(iii). A purchase on an exchange cannot be exempted. The reason is obvious—and casts a consistent light on the prime purpose of the Rule; a purchase on an exchange becomes a broadcast item and consequently one of the components of the price trend of the security. The purchases complained of were not effected on an exchange.

(iv). Purchases from or through brokers or dealers cannot, technically, be exempted. This element of the exemption has the same function as the requirement that the purchase not be made on an exchange. Brokers and dealers are constantly quoting, broadcasting and varying their quotes with indications of change in supply and demand. Thus a purchase from or through a broker or dealer, even though in the over-the-counter market, may have the same tendency to affect market price. But neither Proprietary

(from which 78,600 Piper shares were purchased) nor Bay Securities Corporation (from which blocks aggregating to 21,600 Piper shares were purchased) was a broker or dealer in the conventional sense. Both were "in-house" facilities of mutual fund complexes acting for the funds they served. As such they may well have had the policy of secrecy which characterizes the operations of many funds during the period of acquisition or disposition of blocks. It is a common mutual fund practice to report even significant trades under a "miscellaneous" and unidentified rubric until the intended amount to be purchased or sold has been reached—and then often only in periodic reports after the fact and merely as a change buried in a list of one hundred or more portfolio holdings.[19]

5. *Piper Product Problems*

We deal here with the complaint of Chris-Craft that, as a purchaser of Piper securities, it relied to its detriment on statements of Piper rendered materially false and misleading because of certain vital omissions.

Piper, in its 1967 and 1968 annual reports and in certain other public statements, had issued optimistic reports about a new development (the Pocono plane) and about a principal product (the Twin Comanche) the latter accounting for a significant portion of its revenues. In fact, both of these products were facing serious problems. The Pocono depended for its successful development on an engine to be created by Avco Lycoming. Lycoming, despite its attempts to create one with the required horsepower, failed

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[19] Some time after the occurrence of the events litigated in this case the SEC adopted Rule 10b-13. That Rule interdicts (with exceptions not here pertinent) any purchase by a tender or exchange offeror otherwise than through the tender or exchange. It is a *post hoc* regulation which cannot be applied here.

to do so. The Pocono project, whose continuation or abandonment was a subject of dispute within Piper, was in fact abandoned by Bangor Punta shortly after it acquired control.

The Twin Comanche, while it was extensively sold and used, had operating characteristics which required especial skill and alertness of the pilot for safe handling. At some time or other various governmental agencies had noted and commented on these characteristics and between its inception in 1962 and May of 1969 the Twin Comanche had been involved in 62 fatal accidents resulting in over 130 deaths. Of the 62 accidents, 29 were the result of stall-spins —a propensity of the plane apparent from prior tests.

Chris-Craft complains of a 1967 annual report which described the Pocono as Piper's "major advanced research project", that indicated that the plane was undergoing flight tests, that deliveries of the plane were expected to begin in 1970 and that plans were in progress to build a plant in Florida for manufacture of the product.

The specific criticism levelled against this report by Chris-Craft is as follows:

> Nowhere was the public cautioned that the plane being tested had only an interim engine, that Avco Lycoming had not yet delivered or manufactured the engine required for the plane, and that the success of the venture hinged entirely on the ability of Lycoming to produce an engine powerful enough for the Pocono to meet FAA certification requirements or that it had encountered difficulties and delays in doing so.

Piper, on its side, points to statements in its reports and in trade articles which it claims put the Pocono project in its proper perspective as an "experimental project" "being

tested". It asserts that at no time until September, 1969, was there a discussion of abandoning the project, let alone a decision to do so. Piper points out also that as late as August, 1969, Lycoming said that it could produce, promptly, the required engine for the Pocono. And the testimony of Bangor Punta's chief executive indicates that cost (as well as engineering) was a signficant factor in his decision to abandon the project. There is every indication that if the Pipers had remained in control, the Pocono would not have been abandoned.

We cannot find that Piper's statements, even when viewed in the light of subsequent difficulties and eventual abandonment of the Pocono project, could be deemed materially false as of the time they were made. Chris-Craft denies that it is exercising "hindsight". However, the problems it points to, viewed as of the time of Piper's statements, seem little different from those attending many eventually successful product developments. While it is not easy, in considering the Twin Comanche, to avoid interlacing into the issues of this case the general public policy of air safety, that must, in this Court's view, be done. Chris-Craft has not shown that adjusting the Twin Comanche would be so costly or that limiting the plane to use by experienced pilots would so seriously damage Piper's future as to require it to damage itself by the disclosures claimed necessary to avoid the charge of fraud.

The evidence is convincing that Chris-Craft's original decision to acquire Piper was made without knowledge of the Pocono and Twin Comanche problems—and avowedly with knowledge of little more than what was carried in standard reference sources available in brokerage offices. Despite the fact that by April, 1969 Chris-Craft had two representatives on the board of Piper it did not, it claims, learn of the Pocono and Twin Comanche problems until

September of 1969. By then, its purchasing was over and Bangor Punta was in control.

However, the record affords considerable support for the conclusion that Chris-Craft went into its stock purchasing with no concern about these product problems. The record fairly requires the inference that incidents involving the Twin Comanche and official reports on its operating characteristics could have been timely learned and timely appraised by anyone wishing and able to commit millions to a campaign for control of Piper. The claimed lack of knowledge or notice of products problems is not credited.

Chris-Craft asserts that it relied on Piper's statements (claimed to be misleading because of omissions) respecting the Pocono and Twin Comanche is making its heavy investment in Piper. However, Chris-Craft has not convinced the Court that these products, or what Piper said of them, were considered or material in Chris-Craft's investment decision. To demonstrate the materiality of the Pocono development, Chris-Craft asserts:

> Technology Fund, a mutual fund with no greater expertise about the aircraft industry than Chris-Craft, was Piper's largest record shareholder outside of the Piper family as of January 1969. . . . A Technology Fund research report dated November 19, 1968—more than a month before Chris-Craft's first purchase of Piper—stated, in part:
>
> At 52 Piper is adequately priced and little appreciation is expected until the anticipated extremely favorable third quarter. Quite possibly Piper could go to 18 times 1969 earnings, which produces a price of 63. However, at that level, it would be fully priced and sale would be in order except that before sale, the Pocono's outlook should be reviewed, as it really dominates Piper's future.

The demonstration shows more than it was intended to. As matters stood when the Technology Fund report was written, the Fund was not misled by Piper's reports. It appraised Piper as "adequately priced" at 52. A price of 63 would justify a sale unless a later review of the Pocono development might indicate otherwise.

Chris-Craft, within weeks after this report by the experts of the Fund, paid the Fund more than $6,500,000 to acquire some 101,000 Piper shares held by the Fund. With no more (and perhaps less) information *at the time* than was then available to the Fund's experts it over-anticipated the Fund's most bullish possibility of market value ($63) based on earnings reports and bought deep into the future of Piper and, it claims, Pocono. The "materiality" of the Pocono development is amply demonstrated by this Fund report, but, significantly, materiality as a possibility to be closely watched, not one to be blindly bought. Chris-Craft did not rely on Piper's statements in this regard.

In balancing equities in suit by an ordinary investor this Court might weigh differently the competing duties of Piper's management: on the one hand, to avoid damaging the company by airing internal problems (which with respect to Pocono did not at the time foreshadow the ultimate abandonment of the project and, with respect to Twin Comanche, were not as irremediable as Chris-Craft wishes us to believe) and on the other hand, to avoid a misleading effect in its published statements. But Chris-Craft, under the circumstances of this case, does not merit a weighing in its favor of so delicate a set of duties. In effect, Chris-Craft's management is attempting on this issue to enlist the Court's aid in passing over to others the burden of a purported harm to Chris-Craft's shareholders which Chris-Craft's management could well have avoided by reasonable inquiry. The credible evidence adduced in Chris-Craft's favor does not warrant such a result.

The Claim against First Boston

First Boston and Paul L. Miller and Nicholas H. Bayard of First Boston (the "First Boston defendants") were joined as parties defendant herein. On the basis of the record, the Court cannot find that they committed, or engaged in any course of conduct which operated as fraud or deceit upon Chris-Craft or the public shareholders of Piper.

Indeed, were the record to support Chris-Craft's claims with respect to Piper and Bangor Punta (which it does not) the Court would be hard put to find any basis for extending liability to the First Boston defendants.

First Boston, in its capacity as an investment banker, rendered a variety of professional services to Piper Aircraft Corporation, Bangor Punta and members of the Piper family. In each case, substantive decision making power rested with and was exercised by these clients and not First Boston. First Boston was not responsible for the Piper letter to shareholders dated January 27, 1969. There is no evidence that it did more than contribute to the letter a suggestion within its area of expertise (investment prospects in the light aircraft industries generally), of which plaintiff does not complain.

The suggestions to Piper made by the First Boston defendants in respect to: the cash tender offer by Chris-Craft, the Grumman agreement, the press release concerning Grumman, the U.S. Concrete and Southply transactions, the May 8, 1969 agreement between Bangor Punta and the Piper family, the May 8, 1969 press release in connection therewith, the purchases by Bangor Punta of large blocks of Piper and the prospectuses on the Piper exchange offer, were a legitimate exercise of and limited to professional advice within the area of expertise of First Boston.

The activity of First Boston in the course of its professional relations with Piper, the Piper family and Bangor Punta does not render it responsible or liable for the actions of its clients. The record compels the conclusion that the First Boston defendants acted solely in the furtherance of what they believed in good faith to be the legitimate interests of their clients.

The Relief Requested

The Court of Appeals, with all Judges concurring, affirmed Judge Tenney's denial of a preliminary injunction and the case was remanded to the District Court for further proceedings not inconsistent with the majority's opinion. However, at a pre-trial conference, the plaintiff announced its election on the record to have its case considered as only a straight non-jury damage case rather than an equitable suit for injunction. No such case had been tendered to the Court of Appeals for consideration and the merit of Chris-Craft's suit in support of a damage claim was not before the Court of Appeals.

Chris-Craft acknowledges that its original attempt to have Bangor Punta divested of its majority control was a quest beset with inherent practical difficulty[20] and it gives this as the reason for now seeking damages only. In view of the conclusions reached by the Court on the issues raised by Chris-Craft, it is not necessary to pass on Chris-Craft's theory of computing the damages. However, an analysis of the damage issue here raised will illustrate the anomalous consequences which may flow from according status to sue to disappointed contenders for control,

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[20] Among other things, Chris-Craft asserts that changes effected in Piper under Bangor Punta control render Piper a different company from that into which Chris-Craft bought.

even in cases with more substance and merit than are present in the case at bar.

Chris-Craft evaluates its damages in terms of the appraisal value of its Piper stock in the light of the ability of Bangor Punta to compel a merger at any time. Recognizing the wide disparity of opinion in respect to such value on the part of "experts", Chris-Craft suggests the possible use of the procedure used elsewhere, [21] permitting an aggrieved plaintiff to tender its shares to defendant at cost.

The proximate victims of virtually all the alleged violations of which Chris-Craft complains are one-time Piper stockholders who now hold Bangor Punta stock. These are the very people against whom Chris-Craft wishes us (by a judgment against their company) to assess many millions of dollars of damages in the form of a bail-out of Chris-Craft from its misadventure in Piper.

Were every allegation of Chris-Craft supported by the record, neither reason nor justice would permit such a result. Insofar as the Piper corporation is concerned, the results of assessing damages against it would be equally anomalous. It was the prize in the battle, not a contender. Its equity is held by three distinct groups: Bangor Punta, Chris-Craft, and a small public minority which did not tender shares in the various exchanges proffered. We have already pointed to the reasons for excluding Bangor Punta from the pale of liability. Chris-Craft, of course, would be bailed out if its theory of damages were accepted. This leaves the non-exchanging Piper holders. This is the category of holders intended to be protected. There is no stretch of reason or justice which could conceivably draw

[21] *Gottlieb* v. *Sandia Amer. Corp.*, 304 F. Supp. 980 (E.D. Pa. 1969).

them indirectly into the circle of liability. See, *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, at 867 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), *sub nom.*, *Coates* v. *SEC*, *Kline* v. *SEC*.

However, even properly chosen defendants must be shown to be more than putatively liable. That has not been done with respect to any defendant named by Chris-Craft herein.

While the details of every issue and argument in Chris-Craft's case have not been discussed herein, they have been considered and have not been found to warrant a judgment for Chris-Craft against any of the defendants.

The complaint against the corporate defendants, Bangor Punta and Piper, is dismissed and on the basis of the findings and conclusions herein expressed, the complaint is *a fortiori* dismissed as to all personal defendants.[22]

Counterclaim of Piper Aircraft

Piper has asserted a counterclaim against Chris-Craft charging that the latter violated Sections 13(d) and 14(e) (as well as 10b) of the Exchange Act.[23] This counterclaim repeats virtually all of the contentions made by the plaintiff in *Bangor Punta* v. *Chris-Craft*, S.D.N.Y. 69 Civ. 2354, which is being decided this day. Piper asks this Court to "fashion an appropriate equitable decree to deprive Chris-Craft of the benefit of its violation."

Piper was the unwilling target of Chris-Craft's bid for control of Piper. To avert what it deemed to be a raid by

[22] The agreed findings stipulated by the parties as such are found even if not fully covered herein, *non constat* many are evidentiary rather than findings of ultimate fact.

[23] § 13(d), 15 U.S.C. § 78m(d) (1971); § 14(e), 15 U.S.C. § 78n(e) (1971); § 10(b), 15 U.S.C. § 78j(b) (1971).

Chris-Craft, it invited Bangor Punta to compete with Chris-Craft. Bangor Punta acceded and (with the aid of the substantial blocks of Piper stock held by the Piper family and other significant cooperation of Piper's management) it won the contest. While both contestants may, today, be less than happy at the outcome, Piper was the prize, not a contender. The Court is at a loss to envisage any form of equitable (or other) relief to which Piper might in reason and justice be entitled. Piper's case against Chris-Craft, like Bangor Punta's rests shakily on surmise and speculation and much of it, even if sustainable, is irrelevant to any damage which Piper does or could claim.

The counterclaim of Piper against Chris-Craft is dismissed for failure to sustain the burden of proof thereof.

The foregoing shall constitute the findings and conclusions required by F. R. Civ. P. 52(a).

So Ordered.

December 10, 1971

Milton Pollack
U. S. District Judge

B.

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Court of Appeals Opinion on Relief

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 672, 1055—September Term, 1974.

(Argued February 24, 1975 Decided April 11, 1975.)

Docket Nos. 74-2542, 75-7003

CHRIS-CRAFT INDUSTRIES, INC.,

Plaintiff-Appellant-Cross-Appellee,

v.

PIPER AIRCRAFT CORPORATION, HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICOLAS M. SALGO, DAVID W. WALLACE and THE FIRST BOSTON CORPORATION,

Defendant-Appellees-Cross-Appellants.

Before:

MANSFIELD, OAKES and TIMBERS,

Circuit Judges.

Cross-appeals from judgment entered after a hearing in the Southern District of New York, Milton Pollack, *District Judge*, pursuant to our remand for determination of damages and equitable relief to be awarded a defeated contestant for control of a target corporation resulting from defendants' violations of the federal securities laws.

Affirmed in part; reversed and vacated in part; and remanded with instructions.

ARTHUR L. LIMAN, New York City (Stuart Rabinowitz, Jack C. Auspitz, Anthony M. Radice, Richard A. Miller, and Paul, Weiss, Rifkind, Wharton & Garrison, New York City, on the brief), *for Chris-Craft Industries, Inc.*

JAMES V. RYAN, New York City (C. Kenneth Shank, Jr., Allan J. Graf, and Webster Sheffield Fleischmann Hitchcock & Brookfield, New York City, on the brief), *for Bangor Punta Corporation, Nicholas M. Salgo and David W. Wallace.*

JOHN F. ARNING, New York City (Charles W. Sullivan, Richard Urowsky, and Sullivan & Cromwell, New York City, on the brief), *for The First Boston Corporation.*

ZACHARY SHIMER, New York City (Chadbourne, Parke, Whiteside & Wolff, New York City, on the brief), *for Howard Piper, Thomas F. Piper and William T. Piper, Jr.*

LAWRENCE E. NERHEIM, General Counsel, David Ferber, Solicitor, Charles E. H. Luedde, Attorney Fellow, SEC, Washington, D.C., *for the Securities and Exchange Commission, amicus curiae.*

TIMBERS, *Circuit Judge:*

On these cross-appeals from a judgment entered November 25, 1974 after a four day hearing in the Southern District of New York, Milton Pollack, *District Judge*, 384 F. Supp. 507, pursuant to the remand ordered in our prior decision, *Chris-Craft Industries, Inc.* v. *Piper Aircraft*

Corp., 480 F.2d 341 (2 Cir.), *cert. denied*, 414 U.S. 910 (1973), for determination of appropriate relief to be awarded to Chris-Craft Industries, Inc. (CCI), the defeated contestant for control of the target corporation, Piper Aircraft Corporation (Piper), resulting from defendants' violations of the federal securities laws, the essential questions are:

(1) Whether the district court erred in the method by which it determined a compensatory damage award to CCI in amount of $1,673,988.

(2) Whether the district court erred in holding that CCI is entitled to pre-judgment interest and in refusing to award to CCI attorneys' fees and interest expense on the debt incurred by CCI to finance its acquisition of Piper stock.

(3) Whether the district court abused its discretion in fashioning equitable relief to implement our mandate.

For the reasons below, we affirm the district court's holding that CCI is entitled to pre-judgment interest, its refusal to award to CCI attorneys' fees and interest expense, and its fashioning of equitable relief: but we reverse and vacate its determination of compensatory damages due to CCI and remand with instructions to enter a modified judgment in the amount of $25,793,365, plus pre-judgment interest thereon.

I. PRIOR PROCEEDINGS

This is the third round in this Court during the tumultuous six years of litigation stemming from the battle for control of Piper. The battle was chiefly between CCI, the unsuccessful contestant, and Bangor Punta Corporation

(BPC), the successful contestant. Others (the named defendants-appellees) whose conduct through violations of the federal securities laws contributed to the success of BPC's takeover attempt were held jointly and severally liable with BPC for damages to CCI. On this round in this Court, the issues involve the appropriateness of the relief granted by the district court pursuant to the remand ordered in our last prior decision.

We assume familiarity with our prior decisions and those of the district court involving this contest for control of Piper.[1] We shall summarize here only those facts and prior proceedings necessary to an understanding of our rulings on the essential questions stated above.

CCI began purchasing Piper shares on December 30, 1968.[2] By January 22, 1969, it had acquired more than

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1 In *Chris-Craft Industries, Inc.* v. *Bangor Punta Corp.*, 426 F.2d 569 (2 Cir. 1970) (en banc) *(Chris-Craft I)*, we affirmed Judge Tenney's denial, 303 F.Supp. 191, of a preliminary injunction sought by CCI to prevent BPC from gaining and exercising control of Piper.

In *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341 (2 Cir.), *cert. denied*, 414 U.S. 910 (1973) *(Chris-Craft II)*, involving consolidated appeals from three separate but related actions which had been tried before Judge Pollack, we ruled as follows:

(1) We reversed the dismissal after trial of CCI's complaint against all defendants, 337 F.Supp. 1128; held that all defendants were liable in damages to CCI for violations of the federal securities laws; and remanded the case to the district court for determination of appropriate relief to be awarded to CCI.

(2) We affirmed the dismissal after trial of BPC's complaint against CCI. 337 F.Supp. 1147.

(3) We affirmed the denial after trial of a permanent injunction sought by the SEC against BPC. 331 F.Supp. 1154.

The instant cross-appeals are from the judgment entered by Judge Pollack on November 25, 1974, 384 F.Supp. 507, pursuant to the remand ordered in *Chris-Craft II* for determination of appropriate relief to be awarded to CCI, referred to in subparagraph (1) above.

2 CCI's decision to seek control of Piper was made at a later date.

200,000 shares or approximately 13% of the 1,644,790[3] outstanding Piper shares.

On January 23, CCI announced a cash tender offer, beginning immediately and ending on February 3, to purchase up to 300,000 Piper shares at $65 per share. The closing price of Piper stock on the New York Stock Exchange (NYSE) on January 22 was $52.50. By February 3, CCI had purchased 304,606 Piper shares through tenders pursuant to its offer and an additional 38,800 shares through cash market purchases. These acquisitions brought its total holdings to 547,106 shares or approximately one-third of the outstanding Piper stock.

Piper management (essentially the Piper family) in the meantime had decided to resist CCI's takeover bid. On January 27, Piper sent a letter to its shareholders urging them to reject CCI's offer and advising them that the Board of Directors "has carefully studied this offer and is convinced that it is inadequate and not in the best interests of Piper's shareholders." A similar letter was mailed by Piper to its shareholders on January 28.

One early defensive tactic by Piper involved an agreement entered into on January 28 for the sale of 300,000 authorized but unissued Piper shares to Grumman Aircraft Engineering Corporation (Grumman) at $65 per share. On January 29, a press release was issued and a letter was sent to Piper shareholders announcing the agreement. These communications, however, failed to reveal a "put" arrangement between Piper and Grumman whereby the latter was given an option to put the shares back to the former after six months. This agreement was terminated on March 19 after the NYSE refused to list the new stock.

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3 Piper's annual report for 1969 states that 1,644,790 shares were outstanding. We therefore shall use that figure, as did the court below, 384 F.Supp. at 525, rather than the figure of 1,644,890 referred to in our prior opinion. 480 F.2d at 350.

Meanwhile, CCI had decided to try to obtain the additional shares it needed for control through an exchange offer of CCI securities for Piper stock. On February 27, CCI filed an S-1 with the Securities and Exchange Commission (SEC) to acquire between 80,000 and 300,000 shares of Piper. A May 7 press release announced this offer which became effective May 15. CCI's release placed no value on its exchange offer, but the First Boston Corporation (First Boston) valued it at $70 to $74 per Piper share.

During the intervening period and after its maneuvers with two other corporations had failed, Piper revived negotiations with BPC which had begun in January. On May 8, a formal agreement was entered into between BPC and the Piper family whereby the latter agreed to exchange all of its Piper holdings (501,090 shares or approximately 31% of the outstanding Piper shares) for a package of BPC securities. BPC also agreed to use its best efforts to acquire more than 50% of the outstanding Piper shares through an exchange offer which placed a value of at least $80 on each Piper share. In addition, if BPC were successful, the Piper family was to receive cash or securities, or both, to bring the value of the package of BPC securities it was to receive up to $80 or more as contrasted with the $70 to $72 value placed on it by First Boston. A press release was issued jointly by Piper and BPC that same day announcing the proposed BPC exchange offer and the $80 value it placed on each Piper share.

After issuance of the May 8 press release but prior to BPC's filing of an S-1 on May 29, BPC made cash purchases of 120,200 shares of Piper. Both before and after the BPC exchange offer became effective on July 18, the Piper family, in an effort to insure the success of BPC's offer, wrote three letters to Piper shareholders on June 4,

June 20 and July 25 disparaging CCI's offer and recommending [illegible] of BPC. The BPC offer which expired on July 29 resulted in the acquisition by BPC of 111,628 shares. First Boston acted as dealer-manager for the BPC exchange offer.

In response to the May 8 press release by Piper and BPC, CCI sweetened its exchange offer, which became effective May 15, with $10 cash through a post-effective amendment on May 16. After six extensions, this offer was withdrawn on July 24, by which time CCI had failed to obtain the minimum 80,000 shares specified in the offer. On July 22, CCI filed a registration statement for another exchange offer, effective July 24, adding substantially more value to its earlier package. Pursuant to this offer which expired on August 4 CCI acquired 112,089 shares.

After the expiration of both exchange offers, CCI and BPC had acquired 41% and 45%, respectively, of the outstanding Piper shares. CCI made additional purchases of 29,200 shares in August and then withdrew from the battle. BPC continued to purchase Piper shares until September 5, by which time it had acquired a majority shareholder position in Piper (839,306 shares or approximately 51%). As of that date, CCI had acquired 697,495 shares or approximately 42% of the outstanding Piper shares.

The instant litigation was begun on May 22, 1969, in the midst of the battle for control, when CCI commenced this action in the Southern District of New York. The complaint alleged violations of the 1933 Act and the 1934 Act. It sought damages and equitable relief.[4]

4 CCI's second amended complaint alleged violations of Section 5(e) of the Securities Act of 1933, 15 U.S.C. §77e(e) (1970), and Rule 135 promulgated thereunder, 17 C.F.R. §230.135 (1974); it also alleged violations of Sections 9, 10(b), 14(e) and 16 of the Securities Exchange Act of 1934, 15 U.S.C. §§78i, 78j(b), 78n(e) and 78p (1970), and Rules 10b-5 and 10b-6 promulgated thereunder, 17 C.F.R. §§240.10b-5 and 240.10b-6 (1974).

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On July 22, CCI moved for a preliminary injunction to prevent BPC from gaining and exercising control of Piper. The preliminary injunction was denied by Judge Tenney on August 19, 1969. 303 F.Supp. 191. We affirmed in an en banc decision on April 28, 1970. *Chris-Craft I*, note 1 *supra*.

Pursuant to our remand to the district court for further proceedings, Judge Pollack, after a bench trial, on December 10, 1971 dismissed CCI's complaint, holding that many of the alleged violations of the securities laws had not been proven, that those which had been proven had not caused injury to CCI and that CCI had failed to prove its claim for damages. 337 F. Supp. 1128.

On appeal from Judge Pollack's decision, on March 16, 1973 we reversed and remanded with directions to grant appropriate relief. *Chris-Craft II*, note 1 *supra*. We held, *inter alia*, that CCI had standing to sue for violations of Section 14(e) of the 1934 Act;[5] that each of the defendants had violated that section and that those violations had caused injury to CCI; and that BPC's violations of Rule 10b-6[6] through its May cash purchases of Piper stock also had caused injury to CCI.

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5 Section 14(e), 15 U.S.C. §78n(e) (1970), provides in relevant part:

"It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. . . ."

6 Rule 10b-6 prohibits bids for or purchases of a security or any right to purchase any such security by or on behalf of the issuer of a security if the security is "the subject of . . . [a] distribution." 17 C.F.R. §240.10b-6 (1974). On May 5, 1969, a few days prior to BPC's cash purchases of Piper stock in May, the SEC promulgated a revision of proposed Rule 10b-13 which dealt specifically with exchange offers and, when adopted, would have prohibited BPC's purchases. SEC Exchange Act Release No. 8595 (May 5, 1969). Rule 10b-13 was not adopted until October 15, 1969 and therefore was not applicable to BPC's May purchases. 17 C.F.R. §240.10b-13 (1974). 34 Fed. Reg. 15,839 (October 15, 1969).

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In order to understand our rulings on the issues raised on the instant appeal, we shall summarize briefly the basis of our decision on the last prior appeal with respect to the liability of each of the defendants.

With respect to the Piper family defendants, we held that they had violated Section 14(e) through: (1) the material misleading statements in their letters of January 27 and 28 to Piper shareholders which said that the pending CCI tender offer of $65 was "inadequate" but which failed to reveal that Piper had received from First Boston its opinion that the CCI offer was "fair and equitable" and that Piper itself was negotiating a large sale of Piper stock to Grumman at the same price; (2) the January 29 press release and shareholder letter which announced the Grumman agreement but failed to disclose the "put" arrangement, that being a material omission; and (3) the June and July shareholder letters which, while disparaging the CCI offer and promoting the BPC offer, failed to reveal that the Piper family stood to profit handsomely under the May 8 agreement should BPC gain control. 480 F.2d at 364-66. We held that all but the third violation (that having been disclosed by a CCI letter to Piper shareholders on June 16) caused injury to CCI by denying it "a fair opportunity to win the contest for control." 480 F.2d at 377.

With respect to BPC and its officers, we held that they had violated Section 14(e) by reason of BPC's failure to disclose in its exchange offer registration statement its negotiations for the sale of its 98.7% holdings in the Bangor and Aroostook Railroad (BAR) at a price some $13 million below the figure of $18.4 million at which the

BAR was carried on BPC's books and its failure to disclose other circumstances which indicated that the BAR book value was unrealistic and obsolete. 480 F.2d at 367-69. As for the May 8 press release, we held, although it violated Section 5(c) of the 1933 Act (as we had held in our earlier en banc decision, 426 F.2d at 573-76), that it was not misleading and therefore not damaging to CCI. 480 F.2d at 366-67.

With respect to First Boston, we held that the material deficiencies in BPC's registration statement and prospectus also provided the basis for Section 14(e) liability on the part of First Boston, the underwriter and dealer-manager for the BPC exchange offer, in that First Boston had not adequately performed its duty in failing to make a reasonable further investigation into the BAR matter when it was aware of facts that strongly suggested that the BPC registration materials were deceptive. 480 F.2d at 369-73.

On the basis of the Section 14(e) violations outlined above, we held that the record established that the injuries sustained by CCI were caused by such violations on the part of the Piper family defendants, BPC and its officers, and First Boston. 480 F.2d at 377. Although we agreed with the district court that "CCI failed to show with reasonable certainty that it would have obtained a controlling position in Piper had it not been for the violations of the securities laws by BPC and First Boston", we held that "it is equally clear that BPC itself obtained control through its violations of the securities laws." 480 F.2d at 373. We further held that "What the securities law violations caused was a denial to CCI of a fair opportunity to compete for control of Piper. The specific injury sustained was a reduction in the value of CCI's Piper holdings upon BPC's unfairly obtaining control." 480 F.2d at 375.

We also held in our prior opinion that BPC had violated Rule 10b-6 through its May cash purchases of Piper stock.

480 F.2d at 377-79. As in the case of BPC's Section 14(e) violations, we concluded that, since BPC eventually acquired only 51% of the Piper stock, those unlawful purchases of three large blocks of Piper stock were crucial to its success. BPC's unlawful conduct denied CCI a fair chance to compete for control and enabled BPC to obtain a majority position which caused CCI to suffer a decline in the value of its Piper holdings. 480 F.2d at 379.

Having concluded that all defendants had violated the securities laws, we remanded the case to the district court with directions to enter a judgment providing at least the following relief (480 F.2d at 380):

> (1) Damages, to be assessed against all defendants jointly and severally,[7] to be measured by "the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority position and reducing CCI to a minority position, and thus being able to compel a merger at any time."
>
> (2) An injunction enjoining BPC from "voting for a period of at least 5 years the Piper shares it obtained through the unlawful May cash purchases and those it obtained through its exchange offer."

On remand, the court awarded CCI compensatory damages in amount of $1,673,988, plus pre-judgment interest in

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7 No liability was imposed on defendant Piper Aircraft Corporation itself since it was not a perpetrator of the violations of the securities laws. Members of the Piper family acted not on behalf of the corporation in committing their illegal acts, but in their own individual interests. 480 F.2d at 379 n. 34. The district court correctly characterized Piper as "the prize in the battle, not a contender." 337 F.Supp. at 1146.

With respect to two officers of First Boston who were named as defendants (Paul L. Miller and Nicholas H. Bayard), on remand CCI stipulated to dismiss the complaint against them, 384 F.Supp. at 510 n. 1, pursuant to our amendment of our prior opinion on petition for rehearing. 480 F.2d at 407.

amount of $599,010.89. It refused to award to CCI attorneys' fees and interest expense on the debt incurred by CCI to finance its acquisition of Piper stock. It included in the judgment injunctive provisions essentially as follows: BPC was enjoined from voting the 231,002 shares it acquired in violation of Section 14(e) and Rule 10b-6 for a period of five years; such shares were not to be counted for the purpose of determining a quorum at shareholders' meetings; such shares were to be considered authorized and outstanding for all purposes under Pennsylvania law and under the judgment; all changes made in Piper's by-laws and in the size of its board since September 4, 1969 were to be rescinded; and no changes were to be made in Piper's by-laws, the size of its board or its corporate charter, unless agreed to by both CCI and BPC or ordered by the court.

We turn now to the issues raised with respect to the district court's formulation of damages; its holdings on CCI's claims for pre-judgment interest, attorneys' fees and interest expense; and its grant of injunctive relief.

II. Damages

(A) *District Court's Formulation Of Damages*

Upon remand the district court held a four day hearing. It received extensive testimony and supporting reports from experts called by both sides on the amount of damages to be awarded to CCI to compensate it for the injury it sustained as the result of defendants' violations of the federal securities laws. The court admitted all evidence offered,[8] subject to its determination of what it believed

8 The testimony and reports of the experts covered a wide range of proposed valuations of CCI's block of Piper stock at various times and under varying methods of valuation and assumptions.

The evidence included valuations of CCI's holdings as of August 7, 1969 (the date on which BPC's limited exchange offer for the Piper family's stock became effective and subsequent to the close of both the BPC and CCI exchange offers) and as of September 5, 1969 (the date BPC gained a majority of Piper stock). Two valuations were offered for each date. The first was premised upon CCI's trailing BPC on those dates (45% to 41% on August 7, 51% to 42% on September 5). The second assumed that, if the 14% of Piper stock illegally acquired by BPC were eliminated, CCI led the contest on those dates (41% to 31% on August 7, 42% to 37% on September 5).

The valuations offered included not only the fair market value and value in a statutory appraisal proceeding of CCI's block of Piper, but also such semantic variations as its "investment" value, its "intrinsic" value, and its market "value" as opposed to its market "price".

And expert opinions were expressed with respect to the price that would be obtained for CCI's Piper shares at hypothetical public and private sales.

to be an appropriate formula for assessing damages. It emerged with a formula substantially as follows.

The court first accepted the general proposition, to which both sides agreed, that our mandate required a comparison of the value of CCI's Piper holdings "prior and subsequent to BP's[9] acquisition of majority ownership." 384 F.Supp. at 512. The court then hypothesized that, in order to make such a comparison, it was necessary to value CCI's holdings both in the situation as it actually existed on September 5[10] and as it theoretically would have existed absent BPC's holding the 14% of Piper stock which it had acquired unlawfully:

9 The district court's opinion uses the abbreviations BP and CC for Bangor Punta Corporation and Chris-Craft Industries, Inc., respectively. We shall continue to use the same abbreviations, BPC and CCI, as we did in our prior opinion.

10 CCI initially urged that the valuation date should be August 7, 1969, but ultimately joined with BPC in agreeing that September 5 was the appropriate date for valuation purposes. 384 F.Supp. at 512 n. 4. We agree that the relevant date is September 5 since that is the date BPC gained a majority shareholder position. Moreover, the record shows that no expert who testified would value the CCI block differently on those two dates, using identical assumptions and valuation methods for each date.

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"Since the inquiry here is to determine the damage suffered by CC *attributable to BP*, it is therefore appropriate to determine what the value of CC's block of stock *would have been worth* on September 5 *absent* BP's illegal conduct, i.e., if CC on that date had led in the contest 42% to 37%. In turn it must be determined how that value was affected by BP's taking a majority position and reducing CC to a minority position." 384 F.Supp. at 512 (emphasis in original) (footnote omitted).

To define the elements of that value, the court focused on our direction that "the measure of damages should be the reduction in the appraisal value of CCI's Piper holdings" attributable to BPC's unlawful acquisition of a majority position. Interpreting this phrase literally, the court concluded that, in the context of our reference to BPC's "being able to compel a merger at any time", our use of the talisman "appraisal value" meant a statutory appraisal proceeding available to dissenting shareholders in a merger situation. 384 F.Supp. at 513.

Elaborating on this measure of value, the court continued:

"Obviously, the objective components of that value, as recognized by the experts—such as asset value, and market value—remained unchanged in BP's gaining a majority. The relevant block for purposes of such an evaluation is merely an anonymous 100-share block, and each of the experts so proceeded. The 'value' of such a block was not altered by BP's unlawful conduct." 384 F.Supp. at 514.

Having concluded that there was no reduction in the intrinsic value of the block of Piper shares held by CCI,

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the court looked to extrinsic value. In so doing, it utilized the concept of a "premium" for the "opportunity to gain control":

"Consequently, the only issue for determination is what *premium* CC's block would have commanded that disappeared once BP took 'control'. CC is presently in a position no different from that of any minority owner (albeit a large one) of any publicly held corporation. Only that premium representing the value of CC's opportunity to gain control has been removed. Thus, it is the removal of that premium which represents the reduction in value of CC's Piper holdings attributable to BP's acquisition of majority ownership." 384 F.Supp. at 514 (emphasis in original).

The first step in the court's attempt to value CCI's lost opportunity to gain control was a determination of the fair market value of Piper stock on September 5 uninfluenced by the fight for control:

"Once the fair market value is determined, the value of CC's opportunity to gain control can be evaluated by determining the value of actual possession of control of Piper to CC. That value will be a figure that must be discounted by the factors of probability of success, time, and the economic benefit of that control to CC's holdings." 384 F.Supp. at 515.

After summarizing the expert testimony offered by both sides, 384 F.Supp. at 515-17, the court averaged the computations of all of the witnesses and concluded that "a round figure of $48. per share seems a reasonable and justifiable estimate of the fair market value per share of Piper stock as of September 5, 1969." 384 F.Supp. at 517.

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Turning next to the problem of quantifying the premium the court thought represented the value of CCI's opportunity to gain control, it theorized that this necessitated "a determination of the value of ultimate control of Piper to CC." 384 F.Supp. at 517. While acknowledging that payment of premiums for control is a well-recognized phenomenon in the American corporate system and that there are tangible benefits to be derived from having control, 384 F.Supp. at 517-18, the court was at a loss to explain what CCI hoped to gain by achieving control of Piper beyond the possibility of a later sale or take-out of its investment.[11] *Id.* at 518-19.

Unable to quantify CCI's subjective expectations of what it could do with control, the court opted for a hypothetical sale of CCI's hypothetical plurality position on September 5:

> "In light of the inability to affix a value to CC's unsuccessful quest for control of Piper (and hence a value to CC for its opportunity to gain that control), the only accurate way of measuring the value of CC's lead position is to determine what CC's position on September 5 was worth to a hypothetical reasonable purchaser." 384 F.Supp. at 520 (footnote omitted).

In the court's view, the value of CCI's plurality position to the unlikely purchaser who would be willing to step into CCI's shoes to continue the control battle would have been substantially reduced not only by BPC's tenacious opposition and its commitment to use every resource available to win the contest but also by the fact that the Piper family and management adamantly opposed CCI's takeover bid. Although two of CCI's experts placed the premium value of CCI's hypothetical plurality block as high as 40% above

11 The record shows that the court questioned each expert extensively on the possible benefits CCI might hope to gain by achieving control of Piper.

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its fair market value, the court credited the testimony of one of defendants' experts, Donald R. Gant, that the premium would be between 5% and 10%. The court referred to Gant as follows:

> "Gant was the only expert to directly explain and quantify the premium that is at the base of this Court's determination, i.e., the premium that exists in a large minority block when that is counterbalanced by another block almost as large that stands in the way of full harmonious utilization of ultimate control if and when that may be acquired." 384 F.Supp. at 523.

The court held that "the *opportunity* (speculative at best) of gaining a majority from a 42% plurality is generously valued at 5% above fair value of the stock, in such circumstances." *Id.* (emphasis in original).

Taking the valuation of that opportunity at 5% and applying that figure to the $48 per share valuation at which it had previously arrived, the court considered that the total damage to CCI came to the quite insubstantial sum of $2.40 per share. The court thus concluded that the total damages to be awarded to CCI were $1,673,988 (i.e. $2.40 times 697,495, the total number of shares held by CCI on September 5, 1969).

(B) *Error In District Court's Formulation Of Damages*

Mindful of the difficult task that confronted the district court in evaluating the extensive expert testimony received at the hearing pursuant to our remand, we nevertheless hold that the court erred in its formulation of the measure of damages to be awarded to CCI.[12]

12 Although we hold that the district court applied an improper legal standard to the facts in formulating the measure of damages to be awarded to CCI, we nevertheless again commend Judge Pollack, as we did in our prior opinion, 480 F.2d at 349-50, upon the clarity of his latest opinion in this complex case.

While the court correctly read our mandate as requiring comparison of the value of CCI's Piper holdings "prior and subsequent to BP's acquisition of majority ownership", 384 F.Supp. at 512, we hold that it erred in proceeding on the assumption that the "appraisal value" of CCI's holdings remained unchanged when BPC gained a majority position and in valuing CCI's holdings by resort to an "anonymous 100-share block". *Id.* at 514.

Moreover, the court erroneously assumed that our phrase "appraisal value" referred to a statutory appraisal proceeding. Such connotation, had we intended it, would have justified the conclusion that there had been no reduction in the value of CCI's Piper holdings upon BPC's gaining control. Our opinion in *Chris-Craft II*, however, expressly forecloses any such intention. We pointed out at least three times that CCI had sustained injury as the result of BPC's unfairly gaining control and that the injury sustained was a decline in the value of CCI's Piper holdings. First, in assessing the impact of defendants' Section 14(e) violations upon CCI, we stated:

> "The specific injury sustained was a reduction in the value of CCI's Piper holdings upon BPC's unfairly obtaining control. . . ." 480 F.2d at 375.

Second, in evaluating the damaging effect of BPC's violations of Rule 10b-6, we held:

> "BPC's attainment of a majority position has caused CCI to suffer a decline in the value of its Piper holdings." 480 F.2d at 379.

Third, in our mandate with respect to the proper measure of damages, we said:

> "The measure of damages should be the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority position and reducing CCI to a minority position. . . ." 480 F.2d at 380.

Accordingly, the court's assumption that there had been no such reduction in the value of CCI's Piper holdings was the first step in reaching an erroneous formulation of damages.

This error was compounded by the court's resort to an "anonymous 100-share block" in valuing CCI's Piper holdings. The use of such a block fails to recognize that on September 5, 1969, CCI held an illiquid 700,000 share minority block. This cannot be compared to a freely marketable block of shares, as we pointed out in our prior decision in the context of defendants' Section 14(e) violations:

> "CCI is entitled to compensatory damages for the decline in the value of the *minority shareholder's interest with which it became encumbered* as a result of competing against those who violated the securities laws." 480 F.2d at 376 (emphasis added).

We surely would not have referred to CCI's interest as being encumbered had we visualized it as having the characteristics of a freely marketable 100 share block. Ownership of 700,000 shares representing 42% of a company's stock can hardly be equated to ownership of 100 shares,[13] especially when counterbalanced by a majority block of 839,000 shares, with only 108,000 other shares outstanding.

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13 In tax cases dealing with the valuation of gifts of large blocks of securities, the principle of "blockage" has long been recognized. *Rushton* v. *Commissioner*, 498 F.2d 88 (5 Cir. 1974); *Warner* v. *Commissioner*, 193 F.2d 328 (2 Cir. 1952); *Richardson* v. *Commissioner*, 151 F.2d 102 (2 Cir. 1945), *cert. denied*, 326 U.S. 796 (1946); *Bull* v. *Smith*, 119 F.2d 490 (2 Cir. 1941). This principle in essence is that the fair market value of a large block of stock actually may be substantially less than the

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Proceeding on these two erroneous assumptions, the court believed that it had to determine the value of CCI's lost "opportunity to gain control" in order to find that CCI had sustained any loss at all upon BPC's obtaining a majority. On that premise the court then ventured into the realm of sheer conjecture in trying to quantify the subjective value to CCI of such control.[14] 384 F.Supp. at 517-23. We agree with the court that valuing the hypothetical premium that CCI's holdings would have commanded from a hypothetical buyer in a hypothetical sale was "well-nigh an impossible task". 384 F.Supp. at 514. See *United States* v. *Byrum*, 408 U.S. 125, 137 n. 10, 138 n. 13 (1972). But we hold that the court erred in assuming that our mandate required it to make such a valuation.

In short, we hold that, in failing to recognize a reduction in the value of CCI's Piper holdings upon BPC's obtaining a majority and in resorting to an anonymous 100 share block for purposes of valuation, the court erred in its formulation of the measure of damages to be awarded to CCI by not carrying out the mandate of our prior decision. See *Crane Co.* v. *American Standard, Inc.*, 490 F.2d 332, 341 (2 Cir. 1973).

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quoted market price because of the inability of the market to absorb a sale of the entire block. Counterbalancing the depressant effect of such a liquidation is the possibility that "a skillful broker could within a reasonable period" liquidate the block in smaller lots at a higher price, *Bull* v. *Smith*, *supra*, 119 F.2d at 492, or the possibility of a secondary distribution. *Warner* v. *Commissioner*, *supra*, 193 F.2d at 329.

14 The court attempted two alternative quantifications of this value. The first, aimed at measuring the subjective value of control to CCI, failed because no witness was able to value the bundle of advantages CCI hoped to gain by acquiring control. 384 F.Supp. at 517-20, 521-22. The second, aimed at measuring the objective value of CCI's position to a hypothetical purchaser, resulted in the court's finding a premium of $2.40 per share for CCI's opportunity to gain control. 384 F.Supp. at 520-21, 522-23.

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(C) *Correct Formulation Of Damages*

As indicated above, the district court correctly accepted the proposition to which both sides agreed that our mandate required a comparison of the value of CCI's Piper holdings both before and after BPC acquired a majority shareholder interest on September 5, 1969. 384 F.Supp. at 512. For the reasons that follow, we hold that the "before value" requires consideration of the prices actually paid by the parties for their acquisitions of Piper stock, while the "after value" should be measured by the price at which CCI could have sold its holdings subsequent to September 5.

Our use of the term "appraisal value" in *Chris-Craft II*, 480 F.2d at 380, in the context of measuring CCI's damages, most assuredly did not contemplate that a valuation of CCI's holdings prior to BPC's acquisition of control would result in a figure less than the price actually paid by CCI for such stock. On the contrary, we contemplated a determination of what premium would have to be added to the price actually paid to reflect the value of CCI's block with its opportunity to acquire control.

The court below failed to perceive the relevance of these figures. In rejecting the actual prices paid as not probative of the value of CCI's holdings before BPC gained a majority position, the court reasoned:

> "The amounts paid by the contestants in the midst of the battle are by no means the sole or even a fair indication of the premium relevant herein. . . . The amounts paid were clearly wildly and artificially inflated due to the emotional, as well as actual, struggle of the parties. Such amounts, therefore, must be discarded . . . ." 384 F.Supp. at 515 n. 8.

We recognize that tender offers, like other contests, do not take place " 'in the peace of a quiet chamber' ", but "under

the stresses of the market place." *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 948 (2 Cir. 1969). In our view, however, the prices paid in the battle for control of Piper represented what astute businessmen, competing in a free market, thought potentially controlling blocks of Piper stock were worth.[15] As one of our late colleagues astutely observed a half century ago:

> "When all is said, value is nothing more than what people will pay for the shares, given as wide an opportunity for bidders to come in as is reasonably possible." *Borg* v. *International Silver Co.*, 11 F.2d 147, 152 (2 Cir. 1925) (L. Hand, *J.*).

Here the contemporary evaluations of Piper stock by BPC and CCI, backed up by cash on the barrelhead, strike us as more realistic and persuasive indicators of value than experts' conceptual appraisals years later based on hypothetical smaller lots. Cf. *Cities Service Co.* v. *United States*, —— F.2d ——, —— (2 Cir. 1974), slip op. 737, 756 (December 13, 1974). We hold that valuation of CCI's Piper holdings prior to BPC's obtaining a majority position should be based on the prices actually paid.

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15 This accords with the district court's observation after the first trial:

> "The contest for control of Piper was sophisticated and hard fought. The contenders were men accustomed to the handling of vast sums of public capital, were assisted by skilled professionals and were themselves seasoned in corporate tactics." 337 F.Supp. at 1131.

We find unpersuasive the arguments of counsel for BPC that the prices paid by the contestants were "irrational", in view of the testimony of David W. Wallace, President of BPC, that PBC had carefully evaluated Piper before seeking control and that he believed BPC had proceeded wisely in going ahead with the Piper acquisition despite the cost involved. Since by its own admission BPC thought Piper stock was worth the price paid, it should not be heard to complain that the price was excessive. *Triangle Waist Co.* v. *Todd*, 223 N.Y. 27, 31, 119 N.E. 85, 86 (1918) (Cardozo, *J.*).

This of course is only the starting point in determining the reduction in value of CCI's Piper holdings due to BPC's unlawful acquisition of control. The value of CCI's block subsequent to that event must also be determined. The correct measure of that value subsequent to September 5 is the price at which CCI could have sold its shares. See *Chasins* v. *Smith, Barney & Co.*, 438 F.2d 1167, 1173 (2 Cir. 1970); *Esplin* v. *Hirschi*, 402 F.2d 94, 104-05 (10 Cir. 1968), *cert. denied*, 394 U.S. 928 (1969). This follows at least in part by analogy to the valuation of CCI's holdings before BPC acquired control based on the prices actually paid. But unlike the "before value" which can be measured by the prices actually paid by the parties, there are no actual figures for the "after value" since CCI never sold its holdings. It is necessary to resort to expert testimony to establish the price at which CCI could have sold its 41% minority position after BPC acquired control.

Since the district court erred in its formulation of the measure of damages to be awarded to CCI, its findings do not contain a proper valuation of CCI's holdings either before or after BPC obtained control. There is evidence in the record, however, to establish those values.[16] Especially since the critical evidence is largely documentary, including the written reports of the experts, we believe this is an appropriate case for us to formulate the correct measure

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16 We recognize that in certain types of cases the failure of the trial court to make necessary findings of fact on the issue of damages requires a remand for such findings. See *Hatahley* v. *United States*, 351 U.S. 173, 182 (1956); *Alexander* v. *Nash-Kelvinator Corp.*, 261 F.2d 187, 191 (2 Cir. 1958). This is especially true in a personal injury case tried to the court where a money judgment necessarily is based on the intangible elements of pain and suffering. In such a case, the trial court's evaluation of the testimony of the witnesses would be crucial. See *Mitchell* v. *Evelyn C. Brown, Inc.*, 310 F.2d 420, 425 (1 Cir. 1962).

The instant case is quite different. Here the critical evidence is largely documentary. The testimony of the experts essentially tracks their extensive written reports.

of damages based on the record. *Dopp* v. *Franklin National Bank*, 461 F.2d 873, 879 (2 Cir. 1972); *Simpson* v. *United States*, 322 F.2d 688, 693 (5 Cir. 1963); *Dale Benz, Inc., Contractors* v. *American Casualty Co.*, 303 F.2d 80, 82 (9 Cir. 1962); *McComb* v. *Utica Knitting Co.*, 164 F.2d 670, 674 (2 Cir. 1947); 9 Wright & Miller, Federal Practice & Procedure §2577, at 701 (1971).

There is another reason for our decision not to remand for another hearing on damages. That is "the extraordinary length of time this litigation has already lingered." *Georgia-Pacific Corp.* v. *U. S. Plywood-Champion Papers, Inc.*, 446 F.2d 295, 299 (2 Cir.), *cert. denied*, 404 U.S. 870 (1971). This case is now in its sixth year of litigation. This is the third appeal to our Court. We have no doubt that, given the tenacity of both sides, a remand would result in still another appeal some two years hence. The ultimate determination of the value of CCI's holdings before and after BPC obtained control in the end would be made by us on the basis of essentially the same record now before us. To remand the case in the light of such a prospect would be a waste of judicial manpower. *Seergy* v. *Kings County Republican County Committee*, 459 F.2d 308, 313 (2 Cir. 1972). We hold that, in the public interest, as well as in the best interests of the parties, it is appropriate, just and within our power to formulate, on the basis of the record now before us, the correct measure of damages and to order that a modified judgment for damages be entered accordingly. 28 U.S.C. §2106 (1970).[17] See *Petition of*

17 28 U.S.C. §2106 (1970) provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."

United States Steel Corp., 479 F.2d 489, 500-01 (6 Cir.), *cert. denied*, 414 U.S. 859 (1973); *Georgia-Pacific Corp.* v. *U.S. Plywood-Champion Papers, Inc., supra*, 446 F.2d at 299; *Alexander* v. *Nash-Kelvinator Corp.*, 271 F.2d 524, 527-28 (2 Cir. 1959).

In formulating the correct measure of damages and modifying the judgment, however, we proceed within certain limits. In modifying the judgment to increase the award of compensatory damages, as the record clearly requires, we believe that the upper limit is the minimum amount of damages that the district court could have awarded without committing reversible error. *Petition of United States Steel Corp., supra*, 479 F.2d at 501; *Traylor* v. *United States*, 396 F.2d 837, 840 (6 Cir. 1968); *Mitchell* v. *Evelyn C. Brown, Inc.*, 310 F.2d 420, 426 (1 Cir. 1962); *United States Fidelity & Guaranty Co.* v. *United States*, 152 F.2d 46, 49 (2 Cir. 1945).

With this in mind, we hold that the lowest figure at which the district court could have valued CCI's Piper holdings prior to BPC's acquisition of control was CCI's total cost—an aggregate of $44,628,267 for 697,495 shares, or an average of $63.98 per share. 480 F.2d at 354-55. As indicated above, in valuing potentially controlling blocks of shares in a target corporation, great weight must be given to the prices actually paid by businessmen competing in the marketplace for shares to build up their holdings. On the record before us, there is no better indicator of the value of CCI's block than its cost to CCI. Our prior opinion contemplated the determination of a premium, which would have been paid for CCI's opportunity to obtain control, over and above the actual cost to CCI of Piper shares. Such premium, added to CCI's cost, would establish the correct value of CCI's block. Since the minimum amount

of that premium would be zero,[18] the lowest possible value of CCI's block therefore would be its cost.

This use of CCI's cost, moreover, gives defendants the benefit of the doubt since it results in a per share valuation of CCI's Piper stock of close to $64—the average price paid by CCI. BPC paid $70 to $80 per share for its acquisitions of Piper stock. According to the testimony of its president, BPC thought it had made a sound investment at those prices.[19] Defendants should not be heard to complain of the use of CCI's substantially lower cost.

In using CCI's average cost of $64 per share in formulating a measure of damages, we recognize that CCI incurred a normal market risk in paying a sizeable premium above the then current NYSE price for its purchases of Piper stock. It knew that if it lost in a fair battle it would face the possibility of incurring substantial losses in disposing of its Piper holdings should it decide at that point to sell. In that event it might very well have been forced to shoulder by itself the entire loss measured by the above formula, i.e. the difference between its cost and the price it could obtain for its holdings as a 42% minority shareholder.

We squarely held in *Chris-Craft II*, however, that CCI did not lose in a fair battle. Although we recognized that CCI had not demonstrated that it would have obtained a controlling position in Piper absent defendants' violations of the securities laws, it was "equally clear that BPC itself obtained control through its violations of the securities laws." 480 F.2d at 373. Defendants' unlawful acts caused "a denial to CCI of a fair opportunity to compete for control of Piper. The specific injury sustained was a reduction in the value of CCI's Piper holdings upon BPC's

18 The district court indicated that this might be so here. 384 F.Supp. at 517-23.

19 See note 15 *supra*.

unfairly obtaining control." 480 F.2d at 375. CCI's payments for Piper stock included a substantial premium for the opportunity to compete for control. Defendants' violations unlawfully deprived CCI of that opportunity. We hold that there is no inequity under these circumstances in shifting the entire burden of CCI's loss to defendants. To do so will effectuate congressional intent that "contests for control between offerors and incumbent management, or other offerors, shall proceed fairly." 480 F.2d at 375.

Nor do we believe that our formulation of damages results in an improper award to CCI for the value of control, as the court below intimated. 384 F.Supp. at 520. In its attempt to quantify the premium which CCI might have commanded for its shares absent BPC's unlawful conduct, the court, citing *Perlman* v. *Feldmann*, 219 F.2d 173 (2 Cir.), *cert. denied*, 349 U.S. 952 (1955), expressed doubt that CCI could properly retain any premium it might realize upon a hypothetical sale of its "plurality" position, since any sale of its potential to acquire control might make it accountable to other shareholders.

Assuming arguendo the correctness of the proposition for which *Perlman* was cited by the district court, we have carefully considered whether our use of CCI's cost in our formulation of damages results in an improper award to CCI for its opportunity to compete for control, to the extent that CCI's cost exceeded the "fair market value" of $48 as found by the court below. In the instant case, we are not dealing with the sale of control by an entrenched majority shareholder to the detriment of the company or its minority shareholders as in *Perlman*. At no time has CCI had control. It has had at most a plurality position in a battle for control. Any premium it might have been able to command for its plurality position would not have harmed Piper or its minority shareholders. All shareholders, including those who became minority public share-

holders, had the opportunity on an equal basis to sell their shares at the premiums which the contestants offered. It is doubtful whether CCI, which never was in control, owed any fiduciary duty to Piper or its shareholders with respect to the price at which it might sell its plurality shares. In short, we are not here concerned with the sale of control in the context of a possible breach of fiduciary duty.

For these reasons, we hold that in formulating the correct measure of damages it is proper to use CCI's cost to value CCI's Piper holdings before BPC's acquisition of control.

We turn next to the valuation of CCI's Piper holdings after BPC acquired control. The record discloses that no expert testified that in his opinion CCI could have sold its Piper holdings on the Philadelphia-Baltimore-Washington Stock Exchange where Piper stock was being traded on September 5, 1969. Such a disposition would not have been feasible in view of the large size of CCI's holdings (approximately 700,000 shares) compared with the small number of Piper shares publicly held by others than BPC and CCI (approximately 108,000 shares).[20] The experts did testify that disposal of CCI's Piper holdings was possible only through a public offering or a private placement.

The private placement alternative, according to the experts, was not realistic. Although they considered the possibility of placing privately CCI's 42% minority interest, none believed that such a sale, either to another company or on an investment letter basis, was feasible. Indeed, defendants' witness Donald R. Gant, who was highly credited by the district court, essentially disavowed such a possibility. His view was concurred in by two of plaintiff's witnesses, Sigmund Wahrsager and Robert Rosenkranz. Gant testified that, assuming CCI was desperate to unload its Piper holdings on September 5 and further assuming

20 See note 13 *supra*.

that it had a commitment from BPC and Piper to cooperate in an underwriting by the purchaser at some later time, it would have been possible to effect a private placement at a substantial discount (25-30%) below what CCI could realize in a public offering. However, there was no commitment to register.

Since the record shows that the chances of a successful private placement were slim compared with a successful public offering and the price which CCI could have obtained through a public offering was substantially higher, we hold that it is appropriate to compute the value of CCI's Piper holdings after BPC acquired control based on a hypothetical public offering. The evidence as to the price which CCI could have obtained through a public offering was primarily the testimony of two witnesses.[21] Defendants' witness Gant testified that in his opinion a public offering on September 5 would have produced for CCI net proceeds after underwriting fees and other expenses of $41.60 to $43.50 per share. Plaintiff's witness Wahrsager testified that, in view of the necessity for audited financial statements of Piper's fiscal year ending September 30, 1969 before there could be a public offering and allowing time for the registration process, the earliest realistic date for a public offering of CCI's Piper holdings was the end of January 1970. At that time in his opinion CCI would have realized $27 per share.[22]

21 Although other witnesses called by both sides testified to valuations of CCI's block of Piper shares after BPC gained a majority, they did not base their opinions on a proposed public offering. Aubrey B. Lank, defendants' witness, based his valuation solely on the amount that could be obtained in a statutory appraisal proceeding. Although plaintiff's witnesses Robert F. Murray and Robert Rosenkranz addressed themselves to the problems of a public offering, they did not specifically premise their valuations on such an offering.

22 Wahrsager also testified that, if all necessary steps could have been accomplished by the end of November 1969, in his opinion CCI would have realized $33 per share through a public offering at that time.

We hold, on the record as a whole, that the Wahrsager figure of $27 represents the most realistic price that CCI could have obtained through a public offering. Gant's assumption that CCI could have made a public offering on September 5, the very day BPC gained a majority, is untenable. Gant himself testified that an offering would have required a registration statement or a no-action letter from the SEC. He based his hypothetical offering on the assumption that a registration statement would have been available as of September 5. He admitted, however, that this would have required a decision by CCI in August that it no longer had any chance to win and that it should dispose of its holdings through a public offering. Leaving aside whether CCI could have proceeded with a public offering based on audited financial statements for the nine months ending June 30, 1969 and even if the cooperation of BPC and Piper in the registration process could have been obtained, it is clear that the battle for control continued at least until August 18 when CCI made its last purchase of Piper stock. In view of the untenable assumptions on which Gant based his opinion, we hold that it was seriously undermined.

Aside from the infirmity of Gant's opinion, we would be constrained to use Wahrsager's figure under the long established principle for computing damages which was reaffirmed in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), where the Court stated that "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Id.* at 265. Here the uncertainties inherent in computing the price which CCI's Piper holdings reasonably would have been expected to bring at a public offering, including the problems of adequate financial statements, delays and market conditions,

must be resolved against defendants. This accords with our prior opinion:

> "By 'resolving doubts in favor of those the statute is designed to protect', Mills v. Electric Auto-Lite Co., [396 U.S. 375, 385 (1970)] we are implementing congressional intent not only to protect investors, but to make sure that contests for control between offerors and incumbent management, or other offerors, shall proceed fairly." 480 F.2d at 375.

We hold on this record that it is appropriate to use Wahrsager's figure of $27 per share as the price which CCI could have obtained for its Piper holdings at a public offering after BPC acquired control.[23]

To summarize on the issue of damages, we hold that the correct formula for determining CCI's damages is the difference between the price CCI paid for its Piper stock ($63.98) and the price it could have obtained for it through a public offering after BPC unlawfully acquired control ($27). This results in damages of $36.98 per share, or a total of $25,793,365, for CCI's block of 697,495 shares.[24]

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23 One of CCI's proposals on the instant appeal is that we require BPC to purchase CCI's block of Piper either at its cost (an average of $64 per share), or at its market value as estimated by CCI's expert Wahrsager ($72 per share), since CCI had no practical way to dispose of its holdings. We reject this proposal, however, because it is belied by the assumed hypothetical sale relied on by the experts in valuing CCI's block after BPC took control. See p. 2863 *infra*.

24 Approximately the same award of damages would result if we were to accept Gant's testimony regarding a private placement of CCI's 42% minority interest.

The district court, as we have indicated, p. 2845 *supra*, relied on Gant's testimony in arriving at a premium of 5% to be added to the fair market value of CCI's holdings to show the value of CCI's plurality with its opportunity to gain control. The addition of this 5% premium to the $64 per share value of CCI's Piper block at which we previously

We therefore vacate the district court's determination of damages due to CCI and remand with instructions to enter a modified judgment in amount of $25,793,365, plus pre-judgment interest thereon.

III. Pre-Judgment Interest, Interest Expense and Attorneys' Fees

The district court on remand also awarded CCI pre-judgment interest from September 5, 1969 on the damages awarded. The court, however, refused to award to CCI its interest expense on the debt it incurred to finance its acquisition of Piper stock, and it refused to award to CCI attorneys' fees. We affirm the district court's holdings with respect to each of these matters.

An award of pre-judgment interest in a case involving violations of the federal securities laws rests within the equitable discretion of the district court to be exercised

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have arrived, p. 2854 *supra*, would result in a per share valuation of $67.20 for CCI's Piper holdings prior to BPC's acquisition of control.

Gant testified, see p. 2856 *supra*, that it would have been possible to sell CCI's block on September 5, 1969 to private investors who were looking to be bailed out in a future public offering if BPC and Piper were willing to commit themselves to cooperate in such an offering. Such a sale, however, could be made only at a substantial discount (25% to 30%) below what he thought CCI could obtain in a public offering (net proceeds to CCI of $41.60 to $43.50). While there was no such commitment on September 5, it is realistic to assume that, had CCI approached BPC and Piper on that date and asked for their cooperation, they would have cooperated in order to reduce their exposure to the possibility of a large damage award in the event CCI should prevail in its lawsuit.

Taking Gant's testimony most conservatively, for the reasons previously stated, pp. 2853-54 *supra*, the application of a 25% discount to Gant's hypothetical offering price of $43.50 would result in an "after value" of $32.62 per Piper share in the formulation of damages. As a check for accuracy, that figure is close to Wahrsager's estimate of $33 for a November 1969 public offering. See note 22 *supra*.

If we were to calculate CCI's damages based on this alternative formula, the result would be $34.58 per share ($67.20 minus $32.62) or a total of $24,119,377.

according to considerations of fairness. *Blau* v. *Lehman*, 368 U.S. 403, 414 (1962); *Wolf* v. *Frank*, 477 F.2d 467, 479 (5 Cir.), *cert. denied*, 414 U.S. 975 (1973); *Norte & Co.* v. *Huffines*, 416 F.2d 1189, 1191-92 (2 Cir. 1969), *cert. denied*, 397 U.S. 989 (1970). Such an award must be compensatory and not punitive. *Norte & Co.* v. *Huffines*, *supra*, 416 F.2d at 1191-92. It is not limited to "a rigid theory of compensation for money withheld", as defendants here contend. *Blau* v. *Lehman*, *supra*, 368 U.S. at 414, quoting from *Board of Commissioners* v. *United States*, 308 U.S. 343, 352 (1939). In view of the long delay since the action was commenced and CCI's otherwise nonreimbursable expenses, including attorneys' fees and interest expense, we hold that the district court did not abuse its discretion in awarding pre-judgment interest. *Norte & Co.* v. *Huffines*, *supra*, 416 F.2d at 1192.

The court awarded pre-judgment interest at the legal rate from September 5, 1969, the award of interest being $599,010.89 based on a damage award of $1,673,988. Interest was computed at the rate of 7½% per annum from September 5, 1969 to August 31, 1972, and thereafter at 6%. N.Y.C.P.L.R. §5004 (McKinney Supp. 1974-1975).

Defendants do not challenge the court's power to award the legal rate of interest but only its computation. They argue that the 1972 amendment to Section 5004 which substituted "at the rate of six per centum per annum" for "at the legal rate"[25] is retroactive and that only the 6% rate should have been used in computing interest here. The New York state courts which have spoken on the question have been unanimous in holding that the amendment is not retroactive. *7 Doyer Street Realty Corp.* v.

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25 Prior to September 1, 1972, the legal rate of interest in New York was set by the state banking board at 7½%. Effective that date, the rate was reduced to 6% by an amendment to N.Y.C.P.L.R. §5004.

Great Cathay Development Corp., 43 App. Div. 2d 476, 352 N.Y.S.2d 483 (1st Dept. 1974); *Yamamoto* v. *Costello*, 73 Misc. 2d 592, 342 N.Y.S.2d 33 (Sup. Ct., Nassau Co., 1973); see *Kaufman* v. *Chase Manhattan Bank*, 370 F.Supp. 279 (S.D.N.Y. 1974); 5 Weinstein, Korn & Miller, New York Civil Practice ¶5004.01 (1973). These cases support, and we affirm, the district court's method of computation of pre-judgment interest. We include in our remand, however, instructions to recompute pre-judgment interest pursuant to the same method but based on the modified judgment for damages in amount of $25,793,365.

CCI appeals from the district court's refusal to award it consequential damages for the interest expense or carrying charges of more than $14,000,000 on the debt it incurred to finance its acquisition of Piper stock. CCI claims that it has been carrying a "locked-in" Piper investment since being reduced to a minority position.

We believe that the applicable rule for recovery of consequential damages here is that summarized in *Zeller* v. *Bogue Electric Manufacturing Corp.*, 476 F.2d 795, 803 (2 Cir.), *cert. denied*, 414 U.S. 908 (1973):

> "A plaintiff seeking consequential damages for fraud, at common law or under federal securities legislation, must establish the causal nexus with a good deal of certainty. Since consequential damages are an addition to or in lieu of what would ordinarily constitute a fair recovery, there is no room here for applying the liberal principles of Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 379, 47 S.Ct. 400, 71 L.Ed. 684 (1927); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563, 51 S.Ct. 248, 75 L.Ed. 544 (1931); and Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264, 66 S.Ct. 574, 90 L.Ed. 652 (1946), where some liberality

> is required to enable an injured plaintiff to recover anything." (footnote omitted).

CCI points to expert testimony which it says demonstrates that it was in fact "locked-in". This contention seems to us to have been undercut by the necessity for the experts to assume a sale of CCI's holdings in order to calculate the proceeds CCI would have realized. Absent any showing of an actual, albeit futile, attempt by CCI to sell its holdings, we find it difficult to find a "causal nexus" between its interest payments and BPC's violations "with a good deal of certainty." We affirm the district court's refusal to award such interest expense.

CCI also appeals from the district court's refusal to award it attorneys' fees. It argues that the public interest has been served by its commencing and prosecuting this action. True, awards of attorneys' fees have been recognized as an incentive to the private enforcement of the federal securities laws for the benefit of the investing public. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389-97 (1970); *Wechsler* v. *Southeastern Properties, Inc.*, 506 F.2d 631, 635 (2 Cir. 1974). Undoubtedly CCI has promoted the public interest in the enforcement of the securities laws by prosecuting this action, but no more so than any private litigant furthers the public interest in suing to enforce rights conferred by statute. Moreover, pursuant to the mandate of our decision today remanding with instructions to enter a modified judgment for damages plus pre-judgment interest thereon, CCI will have recovered a substantial sum out of which it can pay its attorneys' fees and expenses in accordance with the traditional practice. *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1309 (2 Cir. 1973). We hold that, since the award of attorneys' fees in a case such as this one lies within the sound discretion of the district court, *Alpine*

Pharmacy, Inc. v. *Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2 Cir.), *cert. denied*, 414 U.S. 1092 (1973), and we find no abuse of that discretion, we affirm the district court's refusal to award attorneys' fees.

IV. Equitable Relief

Finally, we come to the injunctive relief fashioned by the district court on remand. For the reasons below, we affirm that portion of the judgment.

In addition to directing that damages be awarded to CCI to compensate it for the injury caused by defendants' violations of the securities laws, we ordered that an injunctive provision be included in the judgment which would deny BPC "the fruits of obtaining Piper shares illegally." Specifically, we directed

> "that the district court include in its judgment an injunctive provision barring BPC from voting for a period of at least 5 years the Piper shares it obtained through the unlawful May cash purchases and those it obtained through its exchange offer." 480 F.2d at 380 (footnote omitted).

This contemplated that 231,002 shares, or approximately 14% of the outstanding Piper shares, would be barred from voting. Thus, BPC would be able to vote only 37% instead of 51% of the outstanding Piper shares, while CCI could vote its 42% block. Counting only the shares eligible to vote (1,413,788), this would give BPC 43% of such shares, CCI 49% and the public 8%. CCI in effect would have control through its plurality.

On remand, the court included in the judgment essentially the following injunctive provisions, to remain in effect for a period of 5 years from November 25, 1974, the date the judgment was entered (384 F.Supp. at 528-29):

(1) BPC was enjoined from voting the 231,002 shares.

(2) Such shares, however, would be considered authorized and outstanding for all purposes under Pennsylvania law and under the judgment.

(3) The enjoined shares were not to be counted for the purpose of determining a quorum at stockholders' meetings.

(4) All changes made in Piper's by-laws and the size of its board of directors since September 4, 1969 were to be rescinded; the by-laws, the size of the board and Piper's corporate charter were to remain as they existed on September 4, unless otherwise agreed by both CCI and BPC or ordered by the court.

(5) No increase or decrease in Piper's outstanding voting securities, and no merger, dissolution or liquidation of Piper, could take place without court approval.

(6) BPC was to implement provision (4) by calling a stockholders' meeting within 90 days.

(7) The court retained jurisdiction during the pendency of the injunction to modify it if a change in circumstances warranted.

The court's rationale for the injunctive provisions is outlined generally in its opinion, 384 F.Supp. at 523-26, and is set forth in more detail in its memorandum filed November 22, 1974 on the settlement of the judgment. In its memorandum, the court indicated that its objective in providing injunctive relief was to recognize BPC's 51% ownership of the enterprise regardless of its voting rights and to assure that the corporate assets in which BPC holds a 51% interest would not be "merged, liquidated or

distributed" without its consent during the period of the injunction.

CCI claims that the injunction gives BPC de facto control over Piper contrary to the mandate of our prior decision.[26] In urging that the injunction perpetuates BPC's dominance over Piper despite the fact that CCI now owns a majority of the shares entitled to vote,[27] CCI points to the following consequences of the injunction.

First, by virtue of Piper's cumulative voting system, the board of directors will be deadlocked, with BPC and CCI each electing four directors.[28] Second, a stalemated board will not be able to change the appointments of key Piper officials presently in office as a result of BPC's past control. Third, because BPC's shares remain authorized and outstanding for all purposes under Pennsylvania law and under the judgment, BPC can effectively block any major corporate action by failing to vote for it, since CCI cannot obtain a majority of the outstanding shares even with the support of all of the publicly held shares. Finally, with BPC assured of complete control when the injunction expires in 1979, Piper's executives will remain responsive to the wishes of BPC rather than to those of CCI in the interim. CCI urges that all restraints imposed on it by the injunction be removed except for a prohibition against merging Piper into CCI or an affiliate.

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26 The SEC as amicus curiae supports CCI's position in this respect.

27 Since our prior decision in *Chris-Craft II*, both CCI and BPC have purchased additional Piper stock. They now own 708,300 and 857,921 shares, respectively. Sterilization of 231,002 shares owned by BPC now gives CCI not merely a plurality but a majority (50.1%) of the outstanding shares eligible to vote.

28 Under Piper's cumulative voting system for its eight-man board, CCI and BPC can elect four and three directors, respectively, no matter how many of the publicly held shares are voted. To elect a fourth director, BPC needs only 1,432 additional votes from the public shareholders—less than 2% of the publicly held shares.

After careful consideration of CCI's objections to the injunction, we are not persuaded that the district court abused its discretion in fashioning equitable relief to implement our mandate. See, e.g., *Lemon* v. *Kurtzman*, 411 U.S. 192, 200-01 (1973) (plurality opinion of Chief Justice Burger); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-30 (1944); cf. *SEC* v. *Management Dynamics, Inc.*, —— F.2d ——, —— (2 Cir. 1975), slip op. 2331, 2342-44 (March 18, 1975); *SEC* v. *Shapiro*, 494 F.2d 1301, 1308 (2 Cir. 1974); *SEC* v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1100-03 (2 Cir. 1972). Although we recognize the force of CCI's objections—especially that the board is essentially stalemated—we believe that, considering the substantial investments of both CCI and BPC in Piper, their own financial interests will motivate them of necessity to cooperate in the management of the corporation and in the hiring of its top personnel, as the record indicates they apparently have done to some extent to date. The injunction does implement our mandate by barring BPC from compelling a merger for a period of five years.

If we were to remove all of the restraints imposed on CCI by the injunction as CCI proposes, the effect would be to grant to CCI for a period of five years the very control which it sought but could not prove it would have gained absent defendants' violations of the securities laws.[29] It is true that our prior opinion directed the minimum injunctive relief to be provided. We stated that we did not intend "to foreclose the district court from fashioning such additional appropriate relief as it may find necessary to implement our decision . . . ." 480 F.2d at 380. And our direction that the injunction should bar

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29 Our decision today, in remanding with instructions to enter a modified judgment for damages, is intended properly to compensate CCI for the injury it sustained as the result of defendants' unlawfully depriving it of a fair opportunity to obtain control of Piper.

BPC from voting its ill-gotten Piper shares "for a period of at least 5 years", *id.*, certainly implied that the district court could order the bar for more than 5 years. Under all the circumstances, however, we hold that the district court did not abuse its discretion in fashioning the injunctive relief that it did or in declining to grant more.

We have not overlooked the effect of the injunctive relief granted upon the remaining public shareholders of Piper—some 1400 persons holding 78,569 shares. The SEC as amicus curiae understandably has expressed special concern for these shareholders. It proposes, instead of merely sterilizing BPC's 231,002 illegally acquired shares, that they be treated as though held in a voting trust and during the period of the injunction that BPC be required to vote the shares in proportion to and in the manner that the publicly held shares are voted. We appreciate the SEC's characteristically helpful and innovative suggestion, and we have considered it with care. We have concluded, however, as the SEC itself candidly recognizes, that its proposal would reopen unnecessarily the battle for control, 480 F.2d at 379, at least for the life of the voting trust. Under all the circumstances, and especially against the background of six years of litigation to date, we think that result should be avoided.

We affirm that portion of the judgment that granted injunctive relief.[30]

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30 The cross-appeal by BPC, First Boston, the Piper family defendants and others may be disposed of summarily.

To the extent they claim that no damages at all should be awarded to CCI, the claim is rejected for the reasons set forth above in this opinion.

To the extent they claim that our previous decision in *Chris-Craft II* was erroneous with respect to the issues of standing, liability and causation, we reject such claims as frivolous. Aside from the original panel decision of this Court on March 16, 1973, 480 F.2d 341, which rejected these precise claims, the panel unanimously denied the cross-appellants' petition for rehearing (after amending the opinion as stated above, note 7 *supra*), 480 F.2d at 407; the cross-appellants' petition for rehearing en banc was denied, no judge having requested an en banc poll, 480 F.2d at 407; and the Supreme Court denied certiorari without dissent, 414 U.S. 910 (1973).

We rest on our previous opinion because it represents the law of the case, *Zdanok* v. *Glidden Company, Durkee Famous Foods Division*, 327 F.2d 944, 950-53 (2 Cir.), *cert. denied*, 377 U.S. 934 (1964); because we find no conflict between *Chris-Craft II* and our intervening decisions of *Lanza* v. *Drexel & Co.*, 479 F.2d 1277, 1306 n. 98 (2 Cir. 1973) (en banc), and *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1299 n. 17, 1301 n. 20 (2 Cir. 1973), cited by cross-appellants; and because we are satisfied with it. *United States* v. *Certain Property, Etc.*, 344 F.2d 142, 144 (2 Cir. 1965).

SUMMARY

The following is a summary of our essential holdings:

(1) We reverse and vacate the district court's determination of damages due to CCI and we remand with instructions to enter a modified judgment in amount of $25,793,365, plus pre-judgment interest thereon, since the correct measure of damages due to CCI is the difference between the price it paid for its Piper stock and the price it could have obtained for it through a public offering after BPC unlawfully acquired a majority shareholder position.

(2) We affirm the district court's holding that CCI is entitled to pre-judgment interest on the damages awarded.

(3) We affirm the district court's holding refusing to award to CCI its interest expense on the debt incurred to finance its acquisition of Piper stock.

(4) We affirm the district court's holding refusing to award to CCI attorneys' fees.

(5) We affirm the district court's grant of injunctive relief as within its discretion in implementing the mandate of our prior decision.

(6) On the cross-appeal by BPC, First Boston, the Piper defendants and others, we find the claims of error to be wholly without merit.

(7) We order that costs be taxed in favor of CCI on its appeal and in favor of CCI on the cross-appeal.

Affirmed in part; reversed and vacated in part; and remanded with instructions.

District Court Opinion on Relief

CHRIS-CRAFT INDUSTRIES, INC.,
Plaintiff,

v.

PIPER AIRCRAFT CORPORATION
et al., Defendants.

No. 69 Civ. 2227 (MP).

UNITED STATES DISTRICT COURT,
S. D. NEW YORK.
Nov. 6, 1974.

Paul, Weiss, Goldberg, Rifkind, Wharton & Garrison, New York City, for plaintiff; Arthur L. Liman, Jack C. Auspitz, Anthony M. Radice, and Richard A. Miller, New York City, of counsel.

Webster, Sheffield, Fleischmann, Hitchcock & Brookfield, New York City, for defendants (Bangor Punta Corporation, David W. Wallace and Nicolas M. Salgo); James V. Ryan, C. Kenneth Shank, Jr., and Robert A. Kandel, New York City, of counsel.

Sullivan & Cromwell, New York City, for defendant (The First Boston Corp.); J. F. Arning, C. W. Sullivan, and R. Urowsky, New York City, of counsel.

Chadbourne, Parke, Whiteside & Wolff, New York City, for defendants (Piper Aircraft Corporation, Howard Piper, Thomas F. Piper and William T. Piper, Jr.); Zachary Shimer, New York City, of counsel.

POLLACK, District Judge.

This case is on remand from the Court of Appeals to determine the quantum of compensatory damages due to Chris-Craft Industries, Inc. (CCI or CC herein) from the

defendants who were not dismissed from this suit and to include in the judgment an injunctive provision barring Bangor Punta Corporation (BPC or BP herein) from voting for a period of at least 5 years the Piper shares it obtained through purchases for cash and by an exchange offer which did not comply with the securities laws.[1]

Briefly, the Court of Appeals held herein that where a successful contender for control of a target corporation has attained part of its majority of the voting shares of the target corporation by purchases made in violation of the securities laws, the defeated contestant for control, although it neither purchased any securities from its competitor nor was deceived by any acts or statements of the latter, was entitled to sue the winner for damages as may be shown, measured by the reduction, if any, in the appraisal value of its shares of the target corporation when its opponent's position as a majority owner became established.

The right to sue and to claim such damages was accorded to encourage and implement the enforcement of the securities laws through private litigation and to deny to a securities law violator the fruits of obtaining shares of stock illegally, even though the unsuccessful contender was not induced by its competitor to enter the contest or to become a purchaser of the shares of the target corporation. The harm done to the defeated contestant according to the Court of Appeals is not that it had to pay more for the stock it bought but that it obtained less stock than it needed

[1] The original order of the Court of Appeals found defendants Paul L. Miller and Nicholas H. Bayard liable to CC. On rehearing, this determination was withdrawn and the Court of Appeals left it to the District Court to determine from the record whether, under the principles of liability regarding First Boston and its officers announced in the opinion on the appeal, either of said defendants was individually liable. The plaintiff then stipulated in the District Court that the complaint against them should be dismissed and it was so ordered.

for control—and this irrespective of whether it be shown that it could in fact have obtained control if there had been no interference with its opportunity.

Twice in the main opinion on appeal, it was clearly stated that, although there was an interference with CC's opportunity to obtain control, CC failed to establish that it could otherwise have succeeded in obtaining enough shares to give it control.[2]

> We agree with the district court's finding that CCI failed to show with reasonable certainty that it would have obtained a controlling position in Piper had it not been for the violations of the securities laws by BPC and First Boston. 480 F.2d 341, at 373.
>
> We cannot say that CCI would have obtained a majority of Piper stock had BPC not violated the law, . . . 480 F.2d at 378-379.

The Court of Appeals pointed out that "the questions presented are of first impression", 480 F.2d 379, and as a moment's reflection will show, in ascertaining the damages called for, the appraisal mandated by the Court of Appeals requires the use of hypothetical figures and values. The parties constructed and theorized such figures and values from circumspectly selected data to supply their damage estimate contentions. Not surprisingly, each side

[2] The concurring opinion of Judge Mansfield points out that early in the control contest, CCI had run out of money and due to a restrictive agreement in effect with its senior noteholders and the prohibitive cost of borrowing additional funds, CC's chances of obtaining loan financing to pick up more of Piper's stock "were negligible" (p. 402) "In summary, having 'shot its bolt' in the financial sense by early February 1969 CCI was thereafter relegated in its quest for control of Piper to the use of exchange offers. It was in no position to purchase for cash any appreciable amount of Piper shares over and above the 304,606 tendered in response to its initial cash offer". 480 F.2d at 402.

charges the other's expert witnesses with internal factual inconsistencies. The Court, in a sense, agrees in the main with both parties.

The Court of Appeals set forth the damage issue for this Court as follows:

> The measure of damages should be the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority position and reducing CCI to a minority position, and thus being able to compel a merger at any time. 480 F.2d at 380.

Controversy produced by the mandate has arisen in part from perplexity in grasping its concept and forging a rational method of application. The words used are capable of a variety of interpretations and shadings, as the parties have demonstrated in their respective briefs, and they have put this Court to the difficult choice between following the strict literal meaning of the words and the broader remedial intent evidenced by the general thrust of the appellate decision. The task of reconciling the often conflicting results stemming from each course, has in turn produced as many complexities as it has clarified. Additionally, the quantification of unliquidated damages is hardly an exact science; computation thereof is accomplished basically by estimation and inference. *See generally* Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-265, 66 S.Ct. 574, 90 L.Ed. 652 (1946); Columbia Pictures Industries, Inc. v. American Broadcasting Companies, Inc., 501 F.2d 894 at 898 (2d Cir. 1974); Crane Co. v. American Standard, Inc., 490 F.2d 332, 343 (2d Cir. 1973) (damage computations "demand prodigies of prophecy and measurement beyond the capacity of jurors and perhaps of a judge").

The damage inquiry herein, naturally enough, called for expert testimony to assist in the evaluation of the manner

and extent to which CC had been damaged by the violations established. The parties took many months to prepare for the hearing on damages. The selection and preparation of their experts was obviously carefully orchestrated; indeed, it would be naive to assume that the experts were selected and proceeded without regard to the interests of the party who called them. Rather, the record clearly reflects that by and large the experts were result-oriented, a fact which tended to restrict their contribution to something less than a full view of the damage problem and to make their results fall short of meeting the full scope of the real questions to be decided.

As a general concept, both parties agree that CC's damages must be measured by comparing the value of its Piper holdings prior and subsequent to BP's acquisition of majority ownership. The disagreement surfaces, however, in the differing paths which the parties take in reaching a valuation.

Preliminarily, there is a deep dispute over the base from which the CC ownership is to be valued for the damage inquiry. BP suggests that no injury occurred until the moment immediately preceding its acquisition of majority ownership. CC, however, argues that its Piper stock should be valued as if CC was the owner of 41%, and BP owned 31% of Piper.[3]

Neither PP nor CC, however, have fully addressed the purpose of the mandate in their analysis of the inquiry before the Court. The Court of Appeals' determination that BP unlawfully purchased 14% of the Piper shares suggests that the 14% must be effectively "discarded" by

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[3] On August 7, 1969, BP owned 45% of Piper and CC owned 41%. BP had acquired 14% of its stock unlawfully; thus, discarding that 14%, CC would have "led" 41% to 31% on August 7.

BP; indeed, the injunction ordered by the Court of Appeals is aimed at effectively freezing the voting of that stock for a significant period. Without that 14%, BP would have owned but 37% on September 5, the date it gained a majority. CC, meanwhile, would have held at least 42%, the amount it in fact ended up with on that date. Since the inquiry here is to determine the damage suffered by CC *attributable to BP*, it is therefore appropriate to determine what the value of CC's block of stock *would have been worth* on September 5[4] *absent* BP's illegal conduct, i. e., if CC on that date had led in the contest 42% to 37%. In turn it must be determined how that value was affected by BP's taking a majority position and reducing CC to a minority position.

The methodology of that quantification is by no means simple. The Court of Appeals directed this Court to measure the "reduction" in the "appraisal value" of CC's Piper holdings attributable to BP's unlawful conduct. BP, therefore, insisting that the instructions must be literally followed, would have this Court consider BP's merger power and look only at whether there was any reduction in the appraisal value of the Piper stock in the context of a statutory appraisal proceeding, i. e., the amount that a Court would have awarded a Piper stockholder in a statutory appraisal proceeding on September 5, 1969.

CC, on the other hand, argues that BP's literal interpretation of the mandate and any use of the concepts of a statutory appraisal would render the Court of Appeals'

[4] Initially, the parties hotly contested the relevant date to be used for the valuation inquiry. CC initially contended that the Piper stock should be valued as of August 7, 1969. However, in its post-hearing memorandum, CC has abandoned that argument and has joined with BP in adopting the September 5 date for valuation purposes. The crucial question of the methodology to be used, however, remains unchanged.

decision nugatory. CC argues that BP's interpretation would erase any difference in the statutory appraisal value of the Piper shares measured on September 5 just prior and then subsequent to BP's gaining majority ownership.

CC's reading would jettison the measured phrasing of the Court of Appeals' mandate. It must be presumed that the talisman, "appraisal value", was chosen purposefully. The words so used must be viewed in the legal context in which they appear in the mandate. The Court of Appeals associated the reduction of the appraisal value to be found with BP's "being able to compel a merger at any time."[5]

If the word "appraisal" is to be considered in its more colloquial meaning, i. e. "to fix a price . . . as an official value" (Oxford English Dictionary, 3d Ed. 1965), the phrase "appraisal value" would be redundant. To be sure, the Pennsylvania appraisal statute eschews the term "appraisal value" in favor of the words "fair value"; nonetheless, the Pennsylvania cases, as well as the common legal usage in this Circuit and elsewhere, clearly acknowledge the significance of the term "appraisal value" (in the context of merger) as referring solely to statutory proceedings, *see* Lowry v. General Waterworks Corp., 26 Pa.D. & C.2d 154 (1963); Petition of Kreher, 379 Pa. 313, 108 A.2d 708 (1954). *See also* Miller v. Steinbach, 268 F.Supp. 255 (S.D.N.Y.1967) (applying Pennsylvania law). That CC could not have been forced by BP's voting power alone into such an appraisal proceeding while CC hypothetically held a five-percentage-point lead over BP is of no moment. For reasons best known to it, the Court of Appeals has directed this Court to determine the "appraisal value" of

[5] It is basic corporate law that statutory appraisal proceedings, when available, can be invoked by dissenters who object to mergers of the corporate enterprise. Such is the law of Pennsylvania, the law which applies herein. *See* 15 Pa.Stat.Ann. § 1908 (Purdon's, 1967).

CC's Piper holdings as if keyed to such a proceeding, viz., being able to compel a merger.

BP, however, has not convinced the Court with its argument that there was no "reduction" in the appraisal value of CC's Piper holdings. Other considerations could well come into play which might involve advantages from which CC was foreclosed.[6]

Prior to the time that BP gained majority ownership, CC clearly possessed at least the opportunity to itself gain control of Piper, and this opportunity was erased once BP emerged as the holder of a majority of the Piper shares on September 5. Thus, at the moment that CC was confined

[6] It is not at all clear that the Court of Appeals considered the effect of cumulative voting on Piper's even-man Board of Directors. In fact, when the Board stood at eight directors—as it did in September of 1969—BP, as a majority owner, was entiled to but four of the directors, CC three, and the public retained the balance of power. Possession of a mathematical majority of the outstanding shares gives the illusion that the majority will also be able to elect a majority of the directors. However, where, as here, there is cumulative voting and an even-numbered Board of Directors, it takes more than a bare majority to elect more than half of the Board. Thus, as the Piper Board stood in 1969, BP by no means instantaneously achieved the absolute power to compel a merger "at any time" when it obtained 51% of the Piper shares, since it was at that point assured of only half of the directorships and Board approval would have been necessary under Pennsylvania law for any merger plan. *See* 15 Pa.Stat. Ann. § 1902 (Purdon's 1967). To be sure, as plaintiff seems belatedly to have recognized, as a majority stockholder BP could have used its voting power at a stockholders' meeting to alter the by-laws and change the number of the Board of Directors, thereby gaining the mathematical opportunity to elect a majority of the Board. Such an effort in these circumstances would surely have been highly suspect and might well have raised thorny questions for litigation; in any case, the ability to so alter the Board hardly is akin to the Court of Appeals' determination that BP gained the power to force a merger "at any time". *Non constat*, for present purposes this Court will assume that BP did in fact acquire that merger power on September 5, 1969, heeding the oft-repeated rule that the District Court must follow the mandate of the Court of Appeals however erroneous the lower Court may deem that mandate to be. Crane Co. v. American Standard, Inc., 490 F.2d 332, 341 (2d Cir. 1973).

to its minority ownership status, the "appraisal value" of its Piper shares was possibly reduced because of the removal of CC's opportunity to gain control of Piper and would have to be discounted to reflect the uncertainty of its position due to its dependence in some respects on BP's future conduct. CC contends that BP could be expected to choose the bottom of a business cycle to merge and force CC to seek its appraisal rights then under Pennsylvania law.[7]

Quantifying that reduction in present value, however, is well-nigh an impossible task. It is one thing to recognize in the abstract that there has been a "reduction", but quite another to assign a value to that concept. No one can guess when, or even if, BP would ever force CC to submit to or seek a statutory appraisal or predict in what presently unforeseeable way BP might legitimately turn control to its advantage and CC's disadvantage. Indeed, the injunction ordered by the Court of Appeals expressly obviates that possibility for at least five years. BP's "power" to compel a merger is, standing alone, too speculative to quantify. It is highly doubtful that the Court of Appeals intended that this Court should engage in such conjecture. The more logical inference is that this Court should on the basis of good sense as applied to the record reach an appraisal decision making the best estimate possible under the circumstances of what "reduction" in "appraisal value" occurred.

[7] It is unclear as a matter of practical finance whether BP would in fact choose such a time for merger. At the bottom of a business cycle and in a period of contraction, BP (and thus Piper) would clearly have limited resources or at least limited economic incentives to fund an appraisal award; CC's huge minority block, by any standard, would sport a heavy price tag to be borne by BP in such a proceeding. Moreover, as markets rise, the cash cost of satisfying an appraisal demand might well increase greatly without a corresponding increase in available cash to fund the payout, thus chilling any prospect of merger in such circumstances.

Thus, this Court must find a value for CC's Piper holdings both before and after BP gained majority ownership. Obviously, the objective components of that value, as recognized by the experts—such as asset value, and market value—remained unchanged in BP's gaining a majority. The relevant block for purposes of such an evaluation is merely an anonymous 100-share block, and each of the experts so proceeded. The "value" of such a block was not altered by BP's unlawful conduct. Consequently, the only issue for determination is what *premium* CC's block would have commanded that disappeared once BP took "control". CC is presently in a position no different from that of any minority owner (albeit a large one) of any publicly held corporation. Only that premium representing the value of CC's opportunity to gain control has been removed. Thus, it is the removal of that premium which represents the reduction in value of CC's Piper holdings attributable to BP's acquisition of majority ownership.

The value of the plurality position

The determination of the value of CC's hypothetical "lead" of 42% to 37% (and hence the value of CC's lost opportunity to gain control) must be preceded by an estimate of the fair market value of the Piper stock on September 5, 1969. For it is elementary that whatever premium CC's stock contained expressive of its lead position and its opportunity therewith to gain control must be added to the fair market value of its holding in Piper stock on that date.[8]

[8] The amounts paid by the contestants in the midst of the battle are by no means the sole or even a fair indication of the premium relevant herein. The conduct of contestants in such battles is often marked by "irrationality" (Tr. 500-24); no expert testified that the Piper investment was worth anything approaching the $80 per share paid by the parties. The amounts paid were clearly wildly and artificially inflated due to the emotional, as well as actual, struggle of the parties. Such amounts, therefore, must be discarded for purposes of determining *fair* market value.

Once the fair market value is determined, the value of CC's opportunity to gain control can be evaluated by determining the value of actual possession of control of Piper to CC. That value will be a figure that must be discounted by the factors of probability of success, time, and the economic benefit of that control to CC's holdings.

I. Fair Market Value

The "fair market value" of Piper which must be determined is that market value of Piper uninfluenced by the fight for control.[9]

Each of the experts attempted to formulate the fair market value of the Piper stock as of September 5. Their somewhat surprisingly narrow range of disagreement highlights the relative acceptability and uniformity of their techniques and methodologies with respect to estimating a fair market value.[10]

[9] This does not mean that Piper's so-called attractiveness as a "conglomerate target" (alluded to by Prof. Roger Murray, one of the plaintiff's experts, and adopted extemporaneously on the witness stand by another of plaintiff's experts, Robert Rosenkranz) should be ignored. The "fair market value" does no more than remove the distorted, artifically inflated prices that were being paid by the contestants. To the extent that Piper, standing alone, held any "attractiveness" as a target, that "attractiveness" would be represented in its fair market value notwithstanding the presence or absence of a hotly contested fight for control.

[10] At the first trial, plaintiff's expert was Dr. Douglas Bellemore, a Professor at a graduate school of Business Administration. Bellemore never addressed the question of fair market value in his testimony; moreover, what theories he did utilize were, together with their results, wholly out of line with all of the other experts produced by both parties. Indeed, this Court's earlier characterization of Bellemore's testimony as "unsubstantiated and cursory" (337 F.Supp. 1128, at 1153, n. 11) seems now to have been adopted *sub silentio* by his proponent, the plaintiff, which has now abandoned any reliance on the Bellemore testimony. For practical purposes, the Bellemore testimony can be discarded for this inquiry.

The relevant testimony as to "fair market value" can be summarized as follows:

Dr. Sigmund Wahrsager, testifying for CC, determined that the fair market value of the Piper shares on September 5, 1969 would have been $52 per share. Wahrsager is a partner in the Wall Street firm of Bear, Stearns & Co. responsible for the activities of the corporate finance department, which deals with public offerings, private placements, mergers and acquisitions, tenders and evaluation of securities. Wahrsager's testimony as to fair market value reflected utilization of the same technique used by all the experts, *viz.*, to apply a selected price-earnings multiple to Piper's earnings during the period considered. Such a computation has long been recognized as an accepted technique in determining fair market value. *See, e. g.*, Morris v. Burchard, 373 F.Supp. 373 (S.D.N.Y.1974); Vandervelde v. Put and Call Brokers, 344 F.Supp. 118, 150–151 (S.D.N.Y. 1972). *See generally* Dewing, The Financial Policy of Corporations 390-391 (5th Ed. 1953).

Professor Roger Murray, a professor of finance at Columbia University's Business School with a long list of financial credits, another of CC's experts, was somewhat more oblique in his approach. His "fair market value" computation reflected a built-in premium value for CC's lead position. However, stripped of its semantics, Murray concluded that the Piper stock, absent the control fight, would have been valued at $36.75 per share—by far the lowest figure offered by any of the experts.

Plaintiff's remaining expert, Robert Rosenkranz, carrying responsibilties in the corporate finance area, had introduced the Chris-Craft account to his firm, Messrs. Oppenheimer & Co., after the events complained of herein.

The firm became financial adviser to CC in connection with a recapitalization plan. His and their interest are to

be considered in evaluating his testimony. Rosenkranz testified that the Piper stock had a fair market value of $58 in September of 1969.[11]

At the initial trial, defendant's sole expert was Clifford Fitzgerald, vice-president and head of the Corporate Finance Department of Drexel Firestone, Inc. He testified extensively on the subject of the fair market value, the value of control, its elements, how to estimate a premium for control, and the appraisal value of Piper stock. In this Court's earlier opinion, Fitzgerald's testimony was characterized as "careful and well-documented" and "persuasive in the main". 337 F.Supp. at 1153, n. 11. Fitzgerald had testified at that trial that the Piper stock's fair market value was $42.10 per share on September 5, 1969 and he explained in detail how this was arrived at. Each of the experts at the post-trial hearing on damages referred particularly to Fitzgerald's testimony, attempting to harmonize or compare their conclusions with Fitzgerald's. Their reliance on the Fitzgerald analysis in ascertaining fair market value—which utilized the same basic formula of earnings multiplied by an appropriate capitalization rate —reinforces this Court's previous impression of the reliability of Fitzgerald's conclusions.

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[11] In addition, plaintiff on rebuttal produced an unscheduled witness, Mr. Steven Ross, Chairman of Warner Communications, Inc. Ross was presented as a man with business experience in corporate acquisitions, and thus qualified as an "expert" to testify at the hearing. No prior notice was given to defendants of Ross' appearance, despite some months of preparation for expert testimony and agreement between the parties to disclose to each other the identity and opinions of all experts to be used. Ross is a long-time client of plaintiff's counsel in the field of corporate acquisitions and thus his availability must have been known and anticipated for some time. Ross's testimony was confined to the area of his alleged "expertise"; he voiced no opinion as to the value, fair or otherwise, of Piper other than to announce his faith in Nicolas Salgo's (the Chairman of Bangor Punta) judgment.

At the post-trial hearing on damages, defendants presented the record of the Fitzgerald testimony and two additional expert witnesses. The first, Aubrey Lank, is a Delaware lawyer with experience as a Court-appointed appraiser, expert witness and attorney in statutory appraisal proceedings under Delaware law. Lank quantified defendants' statutory appraisal theory of damages. He also computed Piper's fair market value in September 1969 as one element of the appraisal process; his analysis resulted in a fair market value of $52.50 per share and an appraisal value of $49.46.

Defendants' second hearing expert was Donald Gant, a partner of Goldman, Sachs & Co., whose function for 20 years has been to give advice in corporate financing, to carry out public underwritings, private financings, mergers and acquisitions and to do evaluations of securities. While Gant's preparation for the hearing was concentrated on the price CC would have realized from a public distribution of its Piper stock, he also computed the fair market value of the Piper stock on the relevant date at between $44 and $46 per share. Gant's oral testimony further reflected the pragmatic business realities facing a contestant engaged in the titanic struggle portrayed in this case; his analysis utilized realistic financial appraisals rather than abstract academic or statistical notions.

Thus, the figures on fair market value ranged from Murray's strikingly low estimate of $36.75 to Rosenkranz's $58 per share—a spread of some $20 per share. Ignoring the two extremes, however, the spread is reduced considerably, i.e., to $10 per share (from Fitzgerald's $42.10 to Lank's $52.50).

Selecting the appropriate figure involves, obviously, a certain amount of balancing and estimation. As noted, all the experts followed the pattern of reconstructing what

each considered to be the appropriate earnings figure for Piper and then applying a "multiplier" to represent the price/earnings ratio. To derive the proper factor, some experts utilized information relative to Piper's competitors, Cessna and Beech; others gave more weight to the Standard & Poor's general average; and still others relied mainly on Piper's own past performance. Thereafter, each expert took a separate route to his ultimate figure.

Choosing one expert's figure over another on this issue would be to reject one accepted technique while accepting the other. The more prudent course would simply be to average all the computations, an approach advocated by defendants in their post-trial memorandum. *See also* Note, Developments in the Law-Damages, 61 Harv.L.Rev. 113, 125 (1947). Averaging all the experts yields a fair market value figure of $47.73; discarding the highest and lowest figures and averaging the rest results in a value of $47.90. Thus, under all the facts and circumstances, a round figure of $48. per share seems a reasonable and justifiable estimate of the fair market value per share of Piper stock as of September 5, 1969.

II. The Value of Chris-Craft's Opportunity to Gain Control

Quantifying the premium, if any, representing the value of CC's opportunity to gain control of Piper while holding a hypothetical 42% to 37% "lead" entails, of necessity, a determination of the value of ultimate control of Piper to CC.

"The phenomenon of 'control' is perhaps the most important single fact in the American corporate System." Berle, " 'Control' in Corporate Law", 58 Columbia L.Rev. 1212 (1958). Control has been referred to by one commentator as "the complexus of duties and rights possessed

by the custodian of another's goods." Bayne, "A Philosophy of Corporate Control", 112 U.Pa.L.Rev. 22, 29 (1963). The law has never "advertently" defined control in a manner that allows one to reduce it to a money value. (Ibid.) The securities laws refer redundantly to the power to exercise a controlling influence. Despite the amorphous intangible nature of "control", both parties have argued their positions as if they are assuming that "control" is *ipso facto* a valuable personal asset that can be bought and—more importantly—sold or otherwise converted into actual financial gain by its "owner". The control position, however, cannot be viewed so narrowly.

To be sure, private parties have long paid substantial premiums for control positions, and each of the experts who testified before the Court so acknowledged.[12] However, the "value" of having control is not necessarily the price paid in excess of the fair market value of the stock purchased. Control represents different values to different holders. The value of control is, if nothing else, subjective; indeed, "[c]ontrol may be sought for a combination of reasons, some of them so subjective that the buyers may themselves be uncertain regarding their basic intentions." Hill, "The Sale of Controlling Shares", 70 Harv.L.Rev. 986, 1010 (1957). Plaintiff's witness Steven Ross added a literary touch by saying "control gives power over your own destiny" (Tr. 612); but the *value* of this "power" still lies in the realm of subjective judgment (Tr. 631). Perhaps most importantly, the value of control varies with the purposes to which control will be put. *See generally* Bayne, "The Investment Value of Control Stock", 54 Minn.L.Rev. 1265 (1970). Examples of this differing subjective value of

[12] "[A] controlling block of stock has greater sale value than a small lot." Perlman v. Feldmann, 219 F.2d 173, 180 (2d Cir. 1955) (Swan, J., dissenting).

control are easily imagined. Thus, for instance, control of a motor company might be worth far more to another motor company than it would be to a large bank; a motor company might be able immediately to integrate the "target's" operations, and apply its own marketing and management expertise to its acquisition. The bank, on the other hand, would have to expend further substantial sums in acquiring this expertise—either from inside the company or from without—and thus make a much larger investment in the motor company to be acquired. The larger the cost of the investment necessary, assuming a constant return under optimum conditions, the smaller the percentage of that return on the investment, and hence the lower the value of control.

Control, furthermore, has a variety of other measurable values, ranging from the crucially important to the banally mundane. Thus, for example, control carries with it the ability to appoint officials and dictate managerial policy. *See, e. g.*, McClure v. Law, 161 N.Y. 78, 55 N.E. 388 (1899); Honigman v. Green Giant Co., 309 F.2d 667 (8th Cir. 1962). Other advantages of control include the opportunity to liquidate the company, to secure a capital gain, arrange mergers (as recognized in the instant case by the Court of Appeals) and consolidations advantageous to the controlling persons' outside interests, to cut or eliminate dividends to avoid personal income taxes, to grant stock options, and the like. Bayne, "A Philosophy of Corporate Control", 112 U.Pa.L.Rev. 22, 52, n. 103 (1963). In short:

> The corporate assets at control's disposal for the performance of managerial duties range from the portant policies of purchase and sale, of initiation of picayune perquisites of the office—yachts, clubs, secretaries, and chauffeurs—to the determination of imlitigation and declaration of dividends. *Id.* at 49.

Defendant's expert Fitzgerald, testifying at the initial trial, accurately surveyed the elements in valuing control, noting that the holder could derive the benefits of equity financial reporting, the ability to direct the business and its policies, the ability to merge or sell assets, declare dividends, sell stock, obtain counter-seasonal or counter-cyclical effects and the prospects of an enhancement in a price/earnings ratio of the acquirer. (Trial Tr. 1536-42.)[13]

But it is equally clear that the controlling person may not baldly misappropriate this power for his own interests at the expense of the corporation; his primary responsibility is to the corporation itself, for the controlling party is merely a custodian of the powers of his office. *Cf.* Porter v. Healy, 244 Pa. 427, 91 A. 428 (1914); Commonwealth Title Ins. & Trust Co. v. Seltzer, 227 Pa. 410, 76 A. 77 (1910).[14] And unless that custodian can somehow convert that control, and thus enhance the value of his investment through utilization of the control position, that position is—standing alone—not worth any premium. *See* Bayne, "The Investment Value of Control Stock", 54 Minn.L.Rev. 1265, 1281-88 (1970).

In the case presently before the Court, it is not at all clear that CC entered the contest to gain control of Piper and it is even less apparent that CC could have enhanced its investment by gaining control. The timing of CC's entrance into the marketplace in search of Piper stock,

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[13] To be sure Fitzgerald concluded that none of these elements gave any added value to the control position in this particular case, *see infra* pp. 43-4.

[14] "The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors." Southern Pacific Co. v. Bogert, 250 U.S. 483, 487-488, 39 S.Ct. 533, 535, 63 L.Ed. 1099 (1919). *See also* Berle "'Control' in Corporate Law", 58 Columbia L.Rev. 1212, 1222-4 (1958).

as well as the other evidence adduced both at the initial trial and on the hearing on damages strongly suggest that CC desired and speculated for only a profitable take-out of its Piper investment. Its commitment to seeking long term investment in and control of Piper came later, under compulsion.

Thus, for example, CC's January tender offer was for only 300,000 shares, at a time when it was manifest that CC needed approximately 500,000 shares for control of Piper. CC's former Vice President, C. Leonard Gordon, stated at the initial trial that CC did not want to give the impression that it was committing itself to acquire a majority of the stock because it was not in fact committing itself; that its intention in making this limited tender offer was precisely "to be in a position to sell", "if we could see it was advantageous to get out or necessary to do so"; CC had not arranged for financing necessary to go for control. CC's "Schedule 13", filed with the Securities and Exchange Commission in compliance with the terms of the Williams Act regulating tender offers, 15 U.S.C. § 78n(d-f), while stating that CC was seeking to acquire the Piper shares with a "view" towards control of Piper—used language calculated to leave CC with the option of selling out, according to Gordon (Trial Tr. 372).[15]

More generally, CC's President Herbert Siegel who initiated the Piper purchases frankly acknowledged his unfamiliarity with the aviation business, while insisting

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[15] Indeed, CC even sought a buy-out from BP of CC's Piper shares through the medium of BP's own tender offer. (Trial Tr. 398). However, such a tender would have placed CC afoul of the statutory prohibitions against "short-swing" purchases and sales, 15 U.S.C. § 78p(b), and BP refused to extend the time of its tender offer to remove that obstacle from CC's path. Gordon stated that CC would have tendered the shares to BP if BP had extended the offering time to accommodate CC's problem. (Trial Tr. 398, 421).

that Piper would complement CC's business (Trial Tr. 512-514). Siegel's own personal history of numerous tenders and aborted bids for other corporations failed to demonstrate any long-term interest in his targets except on one occasion—the acquisition of CC itself. Piper was the only situation in the last several years when Siegel did not sell out after strong purchasing took place and before taking a permanent stance in the target (Trial Tr. 522). The foregoing circumstances bear significantly on the value of ultimate control of Piper to CC.

The value of control to CC was directly related to "the totality of the abilities the new man brings to the firm." Bayne, "The Investment Value of Control Stock" 54 Minn. L.Rev. 1265, 1282 (1970). There has been no showing that the Chris-Craft regime could have in any way altered or improved the Piper picture. If anything, the major value of the control position to CC appeared to be solely as a fulcrum for later sale. To be sure, ultimate control of Piper could well have resulted in various forms of improvement of CC's balance sheet, but such amorphous enhancements are incapable of reasonable valuation. Furthermore, to the extent that CC sought control of Piper for the purpose of being able to integrate the Piper earnings with the CC earnings, that result was accomplished even absent control by an accounting methods change in 1970 which permitted such accounting. (Trial Tr. 1538). Thus, in the long run, CC lost nothing in this regard when it lost the fight for a majority of the stock.

It is significant as well to note that the Piper family and management were, to say the least, staunchly opposed to the CC "invasion". Had CC achieved ultimate control, therefore, the prize would have embraced resistant and difficult personalities and CC would have been forced to undertake a wholesale—and expensive—replacement and reorganization of the Piper corporate management structure. A formidable task by any standard, such a course

would have been especially doubtful in light of CC's acknowledged attraction to the Piper name and reputation. (Trial Tr. 513). At all events, such a significant future financial and psychological expense is a substantial discount factor to be applied to the ultimate value of control of Piper to CC.

In light of the inability to affix a value to CC's unsuccessful quest for control of Piper (and hence a value to CC for its opportunity to gain that control), the only accurate way of measuring the value of CC's lead position is to determine what CC's position on September 5 was worth to a hypothetical reasonable purchaser.[16]

But even if CC could have realized the full value of its "plurality position" by a sale, it is not at all clear that the premium, if any, realized thereby could be properly retained by CC. In the atmosphere of recently decided cases, especially where a vocal opposition exists, the exercise of control is bound to be seriously hedged by restrictions protective of minority interests. *Cf.* Perlman v. Feldmann, 219 F.2d 173 (2d Cir. 1955). *See also* Porter v. Healy, 244 Pa. 427, 91 A. 428 (1914). *But see* Essex Universal v. Yates, 305 F.2d 572 (2d Cir. 1962). It is clear here that the excess amounts paid by both CC and BP in August of 1969 were, in effect, "anticipation" premiums; the contestants, in other words, were paying prices with an inflation factor that hopefully, in the end, would be repayed by the traditional "control" emoluments to the victorious bidder. However, between realization of control and the realization of repayment of the premium paid for control are many hazards. Certainly, these factors affect not only what uses control can be put to but also the market value of the control and any attempt to sell it. A contestant who, in the words of expert Wahrsager, allegedly had a

[16] CC correctly points out that the actual *existence* of such a purchaser is immaterial: rather, the "purchaser" must be constructed to determine what value, if any, is *to be ascribed to* CC's lead position on September 5.

"99% chance of gaining control" if it led by 42-37 (Tr. 30) could not, under equitable concepts, sell his plurality position without accountability if the sale of such a position was to deliver control or use it to benefit himself at the minority's expense.

For present purposes it is enough to note that while the "hypothetical purchaser" method is the only way of determining the value of CC's plurality position before BP acquired 51%, such a method raises substantial questions as to whether the existence of the plurality would have added materially to the per share fair market value at the time—absent the plurality.[17]

Similarly, a number of other factors tend to reduce the "premium" that CC might have expected to realize. CC's hypothetical lead cannot be viewed in a vacuum; its opponent, BP, had exhibited extraordinary tenacity, and quite clearly had committed itself to use any and every resource available to win the contest. Furthermore, BP's energies were fully focused towards control of Piper, for it had contractually committed itself to the Piper family to use its "best efforts" to obtain control. It is thus doubtful that BP would have "dropped out" of the fight, even faced with a five-point deficit.[18] The likelihood of any third-party expending enormous sums of cash to take over CC's plurality position just for the privilege of continuing the dogfight with BP is unrealistic and slim at best; defendants' expert

[17] It goes without saying that any sale of CC's plurality position in August or September, furthermore, would have exposed CC to the pitfalls of the short-swing statutes that it so desperately sought to avoid. 15 U.S.C. § 78p(b); Securities Exchange Act, § 16(b). Thus CC was between the Scylla of § 16(b) and the Charybdis of equitable limitations on the sale or use of control.

[18] It should be remembered that BP entered the contest with CC, in effect, holding a 33 percentage-point lead. The expert testimony as to the "statistical probability" of the leader going on to victory is sufficiently doubtful as a matter of business experience and common sense in a situation where there is a bidder with greater resources at his command.

Mr. Gant, in particular, pointed out that unlikelihood in his testimony (Tr. 503).

Furthermore, CC's opponent was not merely BP—it was Piper itself. The Piper family and management had long since displayed its adament opposition to any takeover by CC. The value of having management on BP's side cannot be minimized, and that is a value that BP alone possessed. Moreover, the "winner" of the contest, whoever it might be, knew full well that it would be faced with a large and highly vocal minority opposition—hardly the ideal corporate situation to maximize the potentialities of control. It goes without saying that whatever majority control is worth where the balance of the ownership is scattered and uncoordinated, a majority position is worth less to a third party where a large minority holding exists. This is particularly so where, as here, the rival interests have displayed a willingness to litigate every issue and there is the capacity to force a costly appraisal proceeding to forestall or hamper the exercise of control.

In short, even assuming *arguendo* that CC's "lead" position possessed a value that was personal to CC and did not already belong to Piper, as in the *Perlman* case, the value of that position could be substantially less than the value of the opportunity to gain control in more normal circumstances. The control fight still raged; CC, even with a lead of 42-37, could not be sure of the outcome and the value of control to a third party if it was indeed achieved was, in any case, questionable. The premium value of CC's hypothetical lead was depreciated accordingly.

III. Quantifying the Premium

There was widespread disagreement among the experts as to the dollar value of CC's plurality position.[19] Mr. Wahrsager testified that the ultimate value of control of CC would

[19] All agreed, however, that the premium given either a 41-31 or 42-37 lead would be identical.

lift the value of CC's plurality position by 40% above the fair market value, to $72 per share; that figure, he testified, represented what he thought a third-party would have paid for the lead position. (Tr. 9, 32, 62a). Thus, Wahrsager valued the plurality premium at approximately $20 per share, the difference between what he considered to be the fair market value of $52 per share, and the value of CC's plurality position of $72 per share. The economic climate at the time seems not to have influenced Wahrsager's estimations of value. He testified that in September 1969 a pronounced downward market movement started to become manifest until a real collapse in security prices occurred in the summer of 1970. He did not foresee this decline, his statistical studies did not tell him it was coming and he did not take this deterioration into consideration in his valuations. Furthermore, his $20 figure can be taken as little more than an abstract creation. No one had told Wahrsager what value enhancement CC could derive from its control venture nor did he have any objective basis for estimating dollar-wise what benefit CC could reasonably have expected from being in a position to manage Piper and its dividend policies.

The Court has searched vainly in the record for specific identification of the advantages of control to CC reducible to money value.

Professor Murray's calculation, like his fair market value computation, was somewhat more obscure; he persistently eschewed assigning any premium to CC for its plurality position until a leading question finally evoked his acquiesence that such a premium could be as much as 40% over the fair market value (Tr. 167-8). Murray stated that the contestants for control undoubtedly felt that under their management respectively they could make changes in the hope to enhance Piper's earning power. But he did not

attempt to identify any of the changes or evaluate them or put any dollar figures on them. He said that there was no way that he could read the minds of the decision makers to figure out what their expectations might be.

Mr. Rosenkranz likewise refrained from assigning any premium to CC's block; he said, "It was not part of our assignment to try to assign a premium based on the hypothesis that Chris-Craft had a plurality of the Piper shares." And while his testimony vacillated, Rosenkranz explicitly stated at several points that he would place *no* premium on the lead position because of the ongoing uncertainty of victory even when CC held 41% of the Piper stock despite the prognostications of plaintiff's statisticians to the contrary. (Tr. 267, 306). To be sure, Rosenkranz at times did acknowledge that a lead position could bring some premium (Tr. 228, 309, 320), but nowhere in his testimony did he attempt to assign a premium representing that factor (Tr. 309). It was Mr. Rosenkranz' testimony that the power to choose management cannot be quantified and that there is no way of evaluating the possibility of increasing earnings in the future so as to determine enhancement in value inuring from the acquisition of control (Tr. 331, 332). Thus, to Mr. Rosenkranz the "value" of CC's plurality position was simply $58 per share (Tr. 306, 320).

At the initial trial, defendants' expert Mr. Fitzgerald fully and accurately analyzed the various components entering into the assignment of a control premium, and concluded that had CC gained a majority of the Piper stock, he would still assign no premium to its position; in his words, a control premium "would not seem to be justified or warranted", (Trial Tr. 1536) since the sole measurable value of control herein would be the utilization of the equity accounting method, and such method became available to holders of 20% or more of a company's stock. *See supra*

pg. 519. Despite repeated cross-examination on the subject, Fitzgerald continued to insist that no premium was warranted, no matter which contestant ultimately gained majority ownership:

> Q: As you sit here on this witness stand as an investment banker, can you tell me whether in your opinion a reasonable buyer would be willing today to pay as much per share for Chris-Craft's 42 per cent of Piper as for Bangor Punta's 51 per cent?
>
> A: That is our testimony and that is what I am saying here sitting in this witness box. (Trial Tr. 1585).

Fitzgerald realistically noted that control in the context of the CC—BP battle would be worth very little:

> [I]t is our view that in any situation that would be litigious or hostile it would be very difficult to exercise control and to make reasonable business gambles, as would be the case when you were not being constantly second guessed. (Trial Tr. 1539).

Accordingly, Fitzgerald concluded that there would be no premium attached to the ultimate control position of Piper.

Mr. Gant, testifying for defendants at the post trial hearing, stated that CC could readily dispose of its Piper shares only by way of a public offering in which it could be expected to realize $43 per share. Obviously, any premium value would be dissipated in such a public offering (Tr. 431). Nonetheless, as was the case with Fitzgerald, Gant perceptively and persuasively analyzed the components of that plurality premium; he testified that a party seeking control of Piper *where there was no concentrated opposition* would possibly pay a 20% premium (Tr. 520-1)—half

the figure named by Wahrsager and Murray. However, Gant, like Fitzgerald, accurately recognized that the situation in the present case was far different, since two large holders were bitterly fighting for control. As previously noted, the counter-balancing block greatly dilutes the value of control, and hence reduces any control premium. In consequence, Gant testified that he too thought there would be no premium value attached to CC's lead of 42% to 37% (Tr. 498), that indeed any third-party stepping into the "messy and complicated" fight might have wanted a discount (Tr. 501-2), and that at most a premium figure between 5% and 10% over fair market value might be garnered for the ultimate control position [not for merely the opportunity to gain control]. (Tr. 521). Gant defended his analysis as follows:

> I am describing an atmosphere in which the holder of the majority has a very vocal minority stockholder who is contesting his position and where the board is divided and where litigation proceeds, [and] that is not an atmosphere that most people want to get into and for which they will pay a premium. (Tr. 521).

Gant together with Fitzgerald emerged as the experts on whom the most reliance could be placed in reaching the damages to be ascertained here; Gant together with Fitzgerald gave the most acceptable and convincing guidance on the issues.

Gant was the only expert to directly explain and quantify the premium that is at the base of this Court's determination, i. e., the premium that exists in a large minority block when that is counterbalanced by another block almost as large that stands in the way of full harmonious utilization of ultimate control if and when that may be acquired.

The Court has weighed all the relevant factors indicated in the testimony and reports of the experts and the exhibits introduced at the hearing. The Court has had the opportunity to see and hear the witnesses and to appraise their evidence, its potency and believability in the light of all the facts and circumstances of the trial record and the record of the hearing on the relief to be considered. The Court has appraised the reduction in the appraisal value of CC's Piper holdings attributable to BP's taking a majority position and reducing CC to a minority position. That reduction the Court finds to be $2.40 per share which is the 5% premium above fair market value that the Court finds to have been lodged in a 42% holding of Piper that was erased when BP obtained a majority with illegal purchases of stock on September 5, 1969. These findings reflect weighing of the inflating and deflating factors heretofore indicated upon the range of values of all relevant components.

The evidence persuasively established that actual majority control was worth between 5% and 10% above fair market value of Piper stock in the circumstances of this case with a block of 37% or 42% of the total capital opposing the majority. Certainly then, the *opportunity* (speculative at best) of gaining a majority from a 42% plurality is generously valued at 5% above fair value of the stock, in such circumstances.

Accordingly, the total damages to be awarded to CC are $1,673,988. ($2.40 times the total number of shares held by CC on September 5, 1969, (697, 495)).[20]

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[20] The Court of Appeals held that CC was under no duty to withdraw from the contest prior to September 5 and thus mitigate damages (480 F.2d at 376), despite the admission by CC's officers and experts that the fight was "lost" well prior to that date. (Tr. 30, 264-5, 681, 693, Trial Tr. 459)..

IV. Injunction

The Court of Appeals ordered this Court to "include in its judgment an injunctive provision barring BPC from voting for a period of at least 5 years the Piper shares it obtained through the unlawful May cash purchases and those it obtained through its exchange offer." 480 F.2d at 380.

Injunctions are extraordinary legal remedies; they are granted sparingly, and granted only under terms which insure the protection of all parties—including the party enjoined. *See* Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. R. Co. 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed. 2d 1379 (1960); Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973); Greater Iowa Corp. v. McLendon, 378 F.2d 783 (8th Cir. 1967); New York, Chicago & St. Louis R. R. Co. v. Brotherhood of Locomotive Firemen & Enginemen, 358 F.2d 464 (6th Cir. 1966). Injunctions must therefore be carefully fashioned to fit the particular facts presented. As one Court so aptly put it:

> An injunction decree should conform to the requirements of the case; it should give relief from the wrong committed but it should not be so broad as to inflict an unwarranted injury on the defendant. Servisco v. Morreale, 312 F.Supp. 103 (E.D.La. 1970).) *See also* Goldberg v. Trakas, 206 F.Supp. 867 (E.D.S.C. 1962).

The power of the District Court to attach protective conditions, if warranted, to an injunctive decree is to clear to admit of serious dispute. *See, e. g.,* Lemon v. Kurtzman, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973); Salsbury v. United States, 123 U.S.App.D.C. 69, 356 F.2d 822 (D.C. Cir. 1966); J. M. Fields of Anderson, Inc. v. Kroger Co., 330 F.2d 686 (5th Cir. 1964); Professional Sports, Ltd. v. Virginia Squires Basketball Club, 373 F.Supp. 946

(W.D.Tex.1974); Puerto Rico International Airlines, Inc. v. International Association of Machinists & Aerospace Workers, 366 F.Supp. 646 (D. Puerto Rico 1973). And nowhere are the broad powers of the Court with respect to injunctions clearer than in cases involving federal securities law violations. *See* J. I. Case Co. v. Borak, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964); S. E. C. v. Golconda Mining Co., 327 F.Supp. 257 (S.D.N.Y. 1971).

Furthermore, it is perfectly appropriate for the Court, when necessary, to impose terms and conditions upon the party at whose instance it proposes to act. Inland Steel Co. v. United States, 306 U.S. 153, 156, 59 S.Ct. 415, 83 L.Ed. 557 (1939); Meyers v. Block, 120 U.S. 206, 214, 7 S.Ct. 525, 30 L.Ed. 642 (1887); Russell v. Farley, 105 U.S. 433, 438, 26 L.Ed. 1060 (1882) (noting that such power has been recognized and exercised by courts "from time immemorial"). *See also* Burford v. Sun Oil, 319 U.S. 315, 333 n. 29, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).

In short, in perhaps no other instance is the District Court more clearly given the power—and indeed the duty—to mold and shape the relief to fit the circumstances before it.

> [E]quitable remedies are a special blend of what is necessary, what is fair, and what is workable . . . Inequity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests . . . . Lemon v. Kurtzman, *supra*, 411 U.S. at 200-201, 93 S.Ct. at 1469 (Burger, Ch. J.).

The situation presently before the Court calls for precisely the sort of customized relief envisioned by the cases cited above. BP must be deprived of unfairly benefitting from its unlawful stock purchases, yet CC must not be

fortuitously placed in a position where it will be able to alter BP's investment beyond the life of the Court-ordered injunction. The Court of Appeals squarely refused to hold that CC would have gained control of Piper absent BP's conduct. This Court's injunction therefore should not award CC a benefit to which it would not otherwise be entitled. It is clear that the damage awarded fully compensates CC for the interference with its opportunity to gain control of Piper; the injunction is aimed, in contrast, at enjoining BP, not further rewarding CC.[21]

Events since September of 1969 and particularly during 1974 make special fashioning of this injunction particularly appropriate. For here, it is undisputed that both CC and BP have recently (perhaps with an eye to the ultimate resolution of this lawsuit) resumed purchasing Piper stock on the market. As of June 7, 1974, the parties owned the following Piper shares, out of 1,644,790 shares outstanding as compared with their respective investment on September 5, 1969:

	1969	1974
BP	832,706	857,921
CC	697,495	708,300

Therefore, an injunction prohibiting BP from voting that portion of its Piper shares that were unlawfully acquired, places CC in the position of having 708,300 of the 1,413,788 shares of Piper eligible to vote, or more than 50%. Clearly this would lift CC into benefits which its position in 1969 could not achieve by according to it the same powers of permanently altering the minority investments through

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[21] To be sure, CC will probably take management "control" of Piper during the injunction period, and such a shift is not in conflict with the Court of Appeals' mandate. CC may thus, if it be so advised, alter management policies during the injunction period.

merger, issuance of new stock, recapitalization, dividend policies, or the like.[22] Unless restricted appropriately, CC would thereby be able to convert the "temporary" injunction ordered by the Court of Appeals into a permanent prize. If the Court of Appeals had desired to grant such a license to CC, the injunction ordered would have been permanent, not temporary. It is, therefore, against this background that the injunction must be fashioned—keeping in mind the Court of Appeals' caveat that divestiture of the questioned ownership was not required and that the control battle should not be reopened. 480 F.2d at 379.

The proper balance can best be achieved by simply rolling back the calendar to September 5, 1969, much as was done for the damage inquiry. The parties should revert to their status as on that date, with BP's illegally purchased shares enjoined from voting the stock for a lengthy period. Concurrently, the corporate status of Piper should be likewise frozen as at that date for the period of the injunction. The charter and by-laws of Piper shall revert to the form and content as they existed on September 4, 1969 and shall unless otherwise ordered by the Court, continue in that form and content during the period of the injunction granted hereby.

Similarly, unless otherwise ordered, no stock, rights, options or other devices capable of expansion of capital may be issued by the Corporation or from the Piper treasury during the injunction to alter the September configuration

[22] The stock ownership of CC to the present date has never provided it with enough votes at any time to elect more than three of an eight man board or four of a ten man board. And even if BP could not have voted the illegally acquired shares (231.002) and the outstanding shares entitled to vote are reduced by that amount, CC through September 5, 1969, at no time had enough shares to elect a majority of the board nor did it have the power to vote a merger of Piper.

and no merger, dissolution, liquidation or redemption of securities shall be made; and no debt or obligation, not in the ordinary course of business shall be incurred or placed; except in accordance with the laws of Pennsylvania and pursuant to the charter and by-laws as constituted on September 4, 1969.

The period of this injunction was determined by the Court of Appeals to be not less than five years. The parties have operated as a *de facto* regency—albeit reluctantly—for some five years since the inception of this lawsuit. For better or worse, BP, while clearly exerting its majority influence in certain situations, has been stifled in fact from exercising that control in others. Undoubtedly, the spectre of a large and vocal minority block constricted BP (and perhaps, during the injunction period, CC) from acting as it [or they] would have without such a watchdog. To that extent at least, BP has already been "enjoined" in fact from utilizing the full benefits of its majority position. Nonetheless, the Court cannot agree with BP's contention that the injunction period should be deemed satisfied. Therefore, the period of the injunction ordered by this Court should commence with the filing of the decree on this opinion for the five years recommended.

In addition, this Court will retain jurisdiction during the pendency of the injunction in order to remold or modify the injunction if such a course becomes necessary or appropriate due to any change in circumstances actual or prospective. *See* American Optical Co. v. Rayex Corp., 291 F.Supp 502 (S.D.N.Y. 1967), aff'd, 394 F.2d 155 (2d Cir.), cert. denied, 393 U.S. 835, 89 S.Ct. 109, 21 L.Ed.2d 106 (1968); In re Certain Carriers, etc., 241 F.Supp. 1004 (D.D.C. 1965).[23]

[23] The final form in which the injunctive relief was cast is set out in the Appendix hereto.

V. Other Relief

Plaintiff has, in addition, requested that the interest charges it has borne on loans which financed its Piper investment be awarded to it as consequential damages. Plaintiff contends that its "locked-in" position has precluded the possibility of any escape from Piper, and thus such interest charges are properly recoverable.

There has been no showing that CC has been "locked-in" so that sale of its Piper stock has been impossible. Indeed, the proof adduced at the present hearing was directed precisely at determining the discount due to the minority position. The cost of the use of credit or margin to acquire stock is not a proper element of damage to a purchaser's interest. Moreover, an award of such interest herein would stretch the Court of Appeals' mandate beyond its properly intended limits. Consequential damages are awarded only upon a clear showing of causal connection with the misconduct and the consequence claimed. Zeller v. Bogue Electric Mfg. Corp., 476 F.2d 795 (2d Cir.), cert. denied, 414 U.S. 908, 94 S.Ct. 217, 38 L.Ed.2d 146 (1973). Such a showing has not been and cannot be made here for purposes of an award of interest to CC on the unpaid portion of the purchase price of the Piper stock acquired by CC.

Plaintiff also seeks prejudgment interest on the recovery from the date of the wrong. Where, as here, a claim for relief is federally created, the allowance of interest is to be decided by federal law. *See* Note, Interest on Judgments in the Federal Courts, 64 Yale L. J. 1019, 1040 (1955) (hereafter cited as "Note"). *See also* Perkins v. Standard Oil Co. of California, 487 F.2d 672, 675 (9th Cir. 1973); Briggs v. Pennsylvania R. R. Co., 164 F.2d 21, 22 (2d Cir. 1947), affirmed without consideration of this point, 334 U.S. 304, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948); Murphy v. Lehigh Valley R. R. Co., 63 F.Supp. 928, 929-930 (E.D.N.Y. 1945).

modified, 158 F.2d 481 (2d Cir. 1946). State statutes in respect of prejudgment interest, *e. g.*, N.Y.C.P.L.R. § 5001 (b) (McKinney's Supp. 1973), are thus inapplicable. *See Note, supra,* at 1040.

Prejudgment interest may be awarded where provision therefor is made in the federal statute which creates the federal remedy. *See* 10 Wright & Miller Federal Practice and Procedure § 2664 (1973). In the absence of a specific statute, the operative statute is 28 U.S.C. § 1961. *See Note, supra* at 1040. The federal securities laws are silent in respect of interest. Section 1961 provides, in pertinent part, as follows:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

Thus, the statutory authority provides only for interest on a money judgment, and thus "would seem to exclude the inference that interest should be allowed upon verdicts before judgment." Massachusetts Benefit Assn. v. Miles, 137 U.S. 689, 691, 11 S.Ct. 234, 235, 34 L.Ed. 834 (1891). *But see* Louisiana & Arkansas Ry. Co. v. Export Drum Co., 359 F.2d 311, 317 (5th Cir. 1966) (§ 1961 inapplicable to the question of whether prejudgment interest is a proper element of damages).

Nonetheless, a number of Courts which have considered the question of prejudgment interest in federal securities cases have ruled that the absence of statutory authority other than § 1961 has left the award of equitable prejudgment interest to the discretion of the Court, to be decided by balancing the equities and weighing notions of fairness to the parties. *See, e. g.,* Blau v. Lehman, 368 U.S. 403, 82 S.Ct. 451, 7 L.Ed.2d 403 (1962); Wolf v. Frank, 477 F.2d

467 (5th Cir. 1973, cert. denied, 414 U.S. 975, 94 S.Ct. 287, 38 L.Ed.2d 218 (1973), rehearing denied, 414 U.S. 1104, 94 S.Ct. 739, 38 L.Ed.2d 560 (1973); Wessel v. Buhler, 437 F.2d 279 (9th Cir. 1971); Norte & Co. v. Huffines, 416 F.2d 1189 (2d Cir. 1969), cert. denied sub nom., Muscat v. Norte & Co., 397 U.S. 989, 90 S.Ct. 1121, 25 L.Ed.2d 396 (1970); Speed v. Transamerica Corp., 135 F.Supp. 176 (D.Del. 1955), affirmed, 235 F.2d 369 (3rd Cir. 1956); Pearlstein v. Scudder & German, 346 F.Supp. 443 (S.D.N.Y.1972); Ross v. Licht, 263 F.Supp. 395 (S.D.N.Y.1967); Collier v. Granger, 258 F.Supp. 717 (S.D.N.Y.1966); Pappas v. Moss, 257 F.Supp. 345 (D.N.J.1966), rev'd other grounds, 393 F.2d 865 (3rd Cir. 1968); Perfect Photo, Inc. v. Grabb, 205 F.Supp. 569 (E.D.Pa.1962). *Cf.* Board of Commissioners of Jackson County v. United States, 308 U.S. 343, 352, 60 S.Ct. 285, 289, 84 L.Ed.313 (1939) ("[I]nterest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness.").

The foregoing decisions have not adverted to the question whether Erie R. R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) had any significant impact on notions of the common law that recognized discretionary power to increase damages by interest awards or the effect if any of the post-*Erie* reenactment of 28 U.S.C. § 1961, which squarely addressed the question of interest.

Interest on the obligations created by the securities laws is or is not payable depending upon the purpose of the statutory enactment as applied and upon principles of equity. In equity, the allowance of interest supplies a means of compensating a creditor for loss of use of his money. Thus, recoveries of one's own money through claims bottomed on Sections 12 and 17 of the '33 Act and 10(b) of the '34 Act readily fall within a debtor-creditor

relationship; and equity may quite properly supply prejudgment interest awards in such cases.

However, where the statute is used to vindicate the prophylactic purposes of the law and a private recovery is therefore allowed to a litigant in the posture of this plaintiff, there is a question whether the equitable principle should apply. If the allowance of interest on such an obligation "would serve only to increase the penalty and not to compensate for loss of use of money owing a creditor" (United States v. United Drill & Tool Corp., 87 U.S.App.D.C. 236, 183 F.2d 998, 1000, 1950), allowance of interest becomes questionable.

No instructions with respect to allowance of interest were included in the mandate.[24] However, the basis for and object of the damage award found by the Court of Appeals seem intended to carry the addition of prejudgment interest on the recovery as quantified herein. Consequently, such interest is allowed and shall be computed on the recovery from September 5, 1969 at the legal rate and included in the decree to be entered.

Finally, plaintiff has requested an award of attorney's fees, arguing that a public rather than a selfish interest has been served by this litigation. *See* SEC v. Capital Counsellors, Inc., 378 F.Supp. 224 (S.D.N.Y.1974). If anything is clear concerning this lengthy and bitterly fought litigation, it is that service of the public interest was not CC's motivation and any such service has been wholly incidental and has been amply satisfied by the damages awarded to CC. The law in this country has not yet reached

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[24] The entire problem of interest becomes obviated for a District Court when Rule 37 of the Federal Rules of Appellate Procedure is utilized. That provides that where the District Court's judgment is reversed, the mandate "shall contain instructions with respect to allowance of interest."

the point of rewarding victorious litigants with counsel fees in the circumstances here present; at all events, such an award in this case is not warranted and is denied.

Costs are awarded to the plaintiff to be taxed by the Clerk.

The foregoing shall constitute the findings of fact and conclusions of law required by Rule 52(a) Fed.R.Civ.P.

The parties may submit a decree accordingly conforming with Rule 54(a) Fed.R.Civ.P. for consideration by the Court.

So ordered.

United States District Court

SOUTHERN DISTRICT OF NEW YORK

CHRIS-CRAFT INDUSTRIES, INC.,
Plaintiff,

v.

PIPER AIRCRAFT CORPORATION, HOWARD T. PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICHOLAS M. SALGO, DAVID W. WALLACE, and THE FIRST BOSTON CORPORATION,
Defendants.

69 Civ. 2227 (MP)

MEMORANDUM ON SETTLEMENT OF JUDGMENT

The Court has received and considered suggestions from the parties in respect of the form and content of the decree to be entered herein. The conflicts of view have been resolved as set forth in the judgment filed this day so as to conform to the intent of the Court in respect to the decision made. The following explanatory comments may be of use.

During the injunction period the capital investment of Piper Aircraft Corporation owned by Bangor Punta is not to be reduced or confiscated in part—under the mandate of the Court of Appeals and under the Decree of this Court, the 231,002 Piper shares held by Bangor Punta are viewed as having been legally authorized, issued and outstanding but are made non-voting for a period of five years hereafter. Thus, the power of Bangor Punta to merge without consent of CC which was the principal concern of the Court of Appeals is thus effectively removed from Bangor Punta for the injunction period.

To afford Chris Craft an additional benefit, the decree fashioned by the Court makes this freeze of the vote on those shares retroactive in effect to September 4, 1969. The only use of the vote attaching to the 231,002 shares of Piper stock that has been made by Bangor Punta in the interim has been at the sole stockholders' meeting of Piper held on February 1, 1971 and to undo that use, the Court is directing a new stockholders' meeting at which the 231,002 shares will not be votable shares.

Similarly, since it may be assumed that Bangor Punta had a majority of the Piper board during the interim period as well as prior to September 4, 1969, and that the incumbents are entitled to remain in office until their successors are elected at the next stockholders' election for directors, the Court is adding the benefit to those Chris-Craft receives by directing a near-by vote of stockholders for their choice of directors.

Chris-Craft is not being deprived of a single right which it had on September 4, 1969 according to its own voting strength—nor are voting rights being conferred on Chris-Craft which it did not have. Bangor Punta is being denied part of its voting strength for five years hereafter and this deprivation is being made retroactive to September 4, 1969 by 1) setting aside by-law changes which it caused to be made since that date, and 2) ordering a new election for the one held on February 1, 1971 where Bangor Punta used its total voting strength.

Moreover, since Bangor Punta is entitled at the end of the freeze on part of its voting power to be reinvested therewith, it is entitled to be assured that its property rights in the shares affected which were lawfully authorized and are outstanding and for which it paid and which have not been ordered to be confiscated by the mandate, to know that the corporate assets in which its holds a 51% ownership will not be merged, liquidated or distributed without its consent

during the period that some of its share ownership becomes non-voting for management purposes. This does not give Bangor Punta a negative vote as suggested by the plaintiffs, it merely recognizes the fact that Bangor Punta is a 51% owner of the enterprise and equity regardless of the size of its voting rights.

The plaintiff has suggested that the declaration that Bangor Punta's non-voting shares are to be considered "outstanding for all purposes" suggests that they may be counted for quorum purposes. The Decree will therefore specifically provide that not only shall the 231,002 shares not be voted but they may not be counted for quorum purposes for the period of the injunction.

There is no prohibition in the Decree against an agreement between Chris-Craft and Bangor Punta for merger, liquidation or dissolution as the plaintiff seemingly suggests. The provision in the Decree is designed to prevent the confiscation, without such agreement, of the equity capital owned by Bangor Punta in Piper which Chris-Craft might otherwise be free to undertake albeit the holder of only a minority of the equity capital. The Court of Appeals has ruled that ownership of the equity capital was not to be disturbed; the questioned shares were not to be reoffered to the public for sale; no new round of the control fight was to take place.

> Divestiture of the ill-gotten shares would not be appropriate under the circumstances of this case because it would be difficult to administer and would unnecessarily reopen the control battle. CCI understandably no longer desires to take control of a company that has been substantially changed. It seeks damages. 480 F.2d at 379.

The plaintiff states that the Board of Piper will be deadlocked in the future. If so, and this is not inevitable, the

plaintiff will have gained an advantage that its equity voting strength did not entitle it to without the injunction.

The plaintiff has requested a stay of the Decree pending appeal. However, none of the provisions operate to the disadvantage of plaintiff; they may not be everything that plaintiff hoped for. The notion that Piper will be more stable if the Court does not now suspend Bangor Punta's vote on the 231,002 shares and undo the vote thereof used in February 1971, seems at odds with reality. A stay pending appeal is not required if the object is really to add to the mandate of the Court of Appeals—revision of the mandate must come from the Court of Appeals itself.

It therefore seems to the Court appropriate that the clock should start running now against the voting power of Bangor Punta's 231,002 shares—not later. There has been a de facto regency since 1969 in which the record fails to show any gains by Bangor Punta for itself or any of the true advantages of management control such as enhancement in the value of its ownership interest in Piper. In practical contemplation there has already been a five year suspension of the use to Bangor Punta of the vote on the 231,002 shares and of its ability to compel a merger at any time. The Decree adds on a like period for the future.

The plaintiff's application for a stay of the Decree pending appeal is consequently denied.

MILTON POLLACK
U.S. District Judge

November 22, 1974

United States District Court

SOUTHERN DISTRICT OF NEW YORK

CHRIS-CRAFT INDUSTRIES, INC.,
Plaintiff,

v.

PIPER AIRCRAFT CORPORATION, HOWARD T. PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICHOLAS M. SALGO, DAVID W. WALLACE, and THE FIRST BOSTON CORPORATION,
Defendants.

69 Civ. 2227 (MP)

FINAL JUDGMENT AND DECREE

The above-entitled action having come before the Court for hearing on April 22, 23, 24 and 25, 1974, with respect to the relief to be granted herein after the defendants Howard Piper, Thomas F. Piper, William T. Piper, Jr., Bangor Punta Corporation, Nicholas M. Salgo, David W. Wallace and The First Boston Corporation were held liable to the plaintiff Chris-Craft Industries, Inc. by the judgment and mandate of the United States Court of Appeals for the Second Circuit (480 F.2d 341), and the Court having rendered a decision dated November 6, 1974.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the 231,002 shares of Piper Aircraft Corporation ("Piper") now owned by Bangor Punta, and acquired by it through cash purchases in May, 1969 from Fund of Funds Proprietary Fund, Inc., American Securities Corporation and Bay Securities Corporation and in an exchange offer in July, 1969 to the then shareholders of Piper, shall

be considered authorized and outstanding for all purposes under the laws of Pennsylvania and under this decree, but shall not be voted hereafter by or on behalf of Bangor Punta or counted for quorum purposes for a period of five years and Bangor Punta be and hereby is enjoined accordingly. To the extent that any of such 231,002 shares shall be transferred to former Piper shareholders who accept Bangor Punta's offer to rescission pursuant to the decree of this Court dated May 3, 1974 in *S.E.C.* v. *Bangor Punta,* 70 Civ. 3940, the transferred Piper shares shall be free of this injunction and the voting thereof shall not be restrained by anything contained in this decree.

2. That the changes in Piper's By-Laws and in the size of Piper's Board of Directors since September 4, 1969 shall be rescinded and during the period of the injunction granted by this Decree Piper's By-Laws and the size of its Board shall be reinstated and together with its charter shall remain as they were constituted on September 4, 1969, unless otherwise agreed by the plaintiff and the defendant Bangor Punta or ordered by the Court for good cause shown.

3. That the individual defendants Nicholas M. Salgo, David W. Wallace and William T. Piper, Jr., together with the representatives of Bangor Punta on the Piper Board, at the next meeting of said Board scheduled for December 2, 1974, shall vote for resolutions to cause Piper to convene a meeting of its stockholders for the purpose of electing directors, the meeting to take place within approximately ninety (90) days of such Board action, and at the same meeting to take the necessary action to immediately reinstate Piper's By-Laws as directed above except for the provision which expanded the Board from eight to ten members, the requirement to restore the size of the Board to eight members is to take effect the day of the said stockholders' meeting. In the intervening period between the call

of the stockholders' meeting and the meeting itself, on consent of Bangor Punta, no action shall be taken at a Board meeting of the Piper Board without the consent of the four representatives of Chris-Craft on the Board and Piper shall not seek or be caused to seek proxies for any designee for the said election of directors.

4. That no shares of Piper owned by Chris-Craft or Bangor Punta and no representative of the stockholdings in Piper owned by either corporation, or holding office as a director of Piper shall vote for or acquiesce in (1) the issuance of any stock, rights, options or other devices capable of increasing the outstanding voting shares of Piper beyond the number outstanding as of September 4, 1969, or (2) redemption, reduction, or purchase by Piper of Piper's voting shares outstanding as of September 4, 1969, or, (3) a merger, dissolution or liquidation of Piper, unless the same is ordered by the Court.

5. That the Court will retain jurisdiction during the pendency of the injunction granted to modify said injunction if such a course becomes necessary or appropriate due to any change in circumstances actual or prospective.

6. That Chris-Craft shall recover of defendants, Howard Piper, Thomas F. Piper, William T. Piper, Jr., Bangor Punta Corporation, Nicholas M. Salgo, David M. Wallace, and The First Boston Corporation, jointly and severally, the sum of $1,673,988, plus interest in the amount of $599,010.89, with costs to be taxed by the Clerk.

MILTON POLLACK
U.S. District Judge

Dated: New York, New York
November 22, 1974

C.

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Court of Appeals Opinion on Preliminary Injunction

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 249—September Term, 1969.

(Submitted to the court *in banc*
February 2, 1970* Decided April 28, 1970.)

Docket No. 33983

CHRIS-CRAFT INDUSTRIES, INC.,

Plaintiff-Appellant,

v.

BANGOR PUNTA CORPORATION and DAVID W. WALLACE,

Defendants-Appellees.

B e f o r e :

LUMBARD, *Chief Judge,*
WATERMAN, MOORE, FRIENDLY,** SMITH, KAUFMAN,
HAYS, ANDERSON and FEINBERG, *Circuit Judges.*

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* Argued on September 19, 1969 before a division of the court composed of Chief Judge Lumbard and Judges Waterman and Kaufman. After the filing of panel opinions on November 6, 1969 a petition for rehearing with suggestion that the full court also rehear the case was timely filed. The division denied the rehearing petition as of January 12, 1970, but a rehearing *in banc* was then granted, the *in banc* reconsideration to be had without further oral argument. The parties were granted permission to file further briefs on or before February 2, 1970.

** After the nine active judges decided to rehear the case *in banc* Judge Friendly refrained from any further participation in the disposition of the case.

Court of Appeals Opinion on Preliminary Injunction

Appeal from an order denying a motion for an injunction *pendente lite,* United States District Court for the Southern District of New York, Tenney, *J.* Order affirmed. However, as the rationale of affirming opinion differs materially from rationale of opinion below the case is remanded for further proceedings.

ARTHUR L. LIMAN, JOSEPH J. ACKELL, ALAN L. SCHLOSSER, PAUL, WEISS, GOLDBERG, RIFKIND, WHARTON & GARRISON, New York City, *for Plaintiff-Appellant.*

JAMES V. RYAN, WILLIAM L. D. BARRETT, NANCY L. PASLEY, WEBSTER, SHEFFIELD, FLEISCHMANN, HITCHCOCK & BROOKFIELD, New York City, *for Defendants-Appellees.*

PAUL G. PENNOYER, JR., ZACHARY SHIMER, IRENE CONRAD WARSHAUER, CHADBOURNE, PARKE, WHITESIDE & WOLFF, New York City, *for Piper Aircraft et al.*

PHILIP A. LOOMIS, JR., General Counsel; David Ferber, Solicitor; Meyer Eisenberg, Associate General Counsel; Harvey A. Rowen, Attorney, Securities & Exchange Commission, *for Amicus Curiae.*

WATERMAN, *Circuit Judge*:

Plaintiff-appellant, Chris-Craft Industries, Inc., appeals from the denial of an order entered below in the United States District Court for the Southern District of New York denying appellant's motion for a preliminary injunction to

Court of Appeals Opinion on Preliminary Injunction

restrain Bangor Punta Corporation from gaining and exercising control of Piper Aircraft Corporation pending a trial on the merits of whether certain shares of Piper were acquired by Bangor Punta in violation of governing Rules of the Securities and Exchange Commission. We affirm the denial of the preliminary injunction but remand the case to the district court for further proceedings there not inconsistent with the within opinion.

This litigation comes at the end of a hard fought battle between Chris-Craft Industries and Bangor Punta Corporation for control of Piper Aircraft Corporation. The contest opened in January 1969 when Chris-Craft began to acquire Piper shares on the open market. At that time Piper had 5,000,000 authorized shares of $1.00 par common stock of which 1,641,890 shares were issued and outstanding. In January 1969 Chris-Craft made a public exchange offer for 300,000 Piper shares, and by February these efforts had gained Chris-Craft 34 per cent of the then outstanding Piper stock. On February 27, 1969, Chris-Craft filed with the Securities and Exchange Commission a registration statement and proposed prospectus for an exchange offer for an additional 300,000 shares. Still another exchange offer was announced by Chris-Craft on May 7 and became effective July 24.

Chris-Craft's bid for control met strong resistance from the Piper family and Piper management, who owned 501,090 shares (31 per cent of the outstanding shares), and considered Chris-Craft to be a corporate raider. The management advised other Piper shareholders that Chris-Craft's tender offer was inadequate but offered 300,000 of Piper's authorized but unissued shares to Grumman Aircraft Corporation at the same price that Chris-Craft had offered. Although this transaction was never consummated, Piper initially advertised that Grumman had agreed to purchase

the Piper shares and the court below noted that Chris-Craft's tender offer was adversely affected by this publicity.

Subsequently, on March 22, the Piper management issued 469,199 shares of authorized but unissued stock to acquire control of two subsidiary corporations, United States Concrete Pipe Company of Florida and Southply, Inc. Piper failed to seek the approval of the New York Stock Exchange and of its own shareholders as its listing agreeement with the Exchange provided it should before issuing a significant new block of stock. Therefore, the Exchange refused to approve Piper's listing application. When the Exchange shortly afterward suspended trading in Piper shares and authorized proceedings before the SEC to delist Piper, Piper rescinded both transactions and trading in its shares was resumed.

At this juncture, in April 1969, the Piper family resumed talks which had begun as early as January with Bangor Punta Corporation. These negotiations bore fruit on May 8, when the two groups agreed that the family would exchange its 501,090 shares for specified Bangor Punta securities. Bangor Punta agreed in addition to use its best efforts to acquire enough additional Piper shares to make it the holder of more than 50% of the shares outstanding. As part of these best efforts, Bangor Punta agreed to make an exchange offer to all Piper shareholders "under which such holders will be entitled to exchange each share of Piper common stock held by them for Bangor Punta securities and/or cash having a value, in the written opinion of The First Boston Corporation, of $80 or more." If Bangor Punta succeeded in acquiring 50% or more of the stock, the consideration paid by Bangor Punta would be increased to make up to the Piper family the difference, if any difference there were, between the value of the package specified in the agreement and $80 per share.

The two occurrences which form the basis of Chris-Craft's complaint followed the negotiation of this contract. The first of these occurrences was the issuance by Bangor Punta and the Piper management of press releases announcing the transaction on May 8, the day the contract was signed and the day after Chris-Craft announced the terms of its second exchange offer. After stating that the Piper family would receive Bangor Punta securities for their shares, the Bangor Punta press release continued as follows:

> Bangor Punta has agreed to file a registration statement with the SEC covering a proposed exchange offer for any and all of the remaining outstanding shares of Piper Aircraft for a package of Bangor Punta securities to be valued in the judgment of The First Boston Corporation at not less than $80 per Piper share. The registration statement covering all securities to be issued will be filed as soon as possible and a meeting of the shareholders of Bangor Punta Corporation will be called for approval.
>
> Mr. Piper said that in view of Bangor Punta's longstanding policy of maintaining autonomy in the management of its operating companies, and the similarity of operating philosophies between the two companies, he and the Piper family would strongly support the merger and would recommend it to all shareholders.
>
> Mr. Wallace said Bangor Punta welcomed the association with Piper Aircraft, its world-wide distribution, and its prestigious product name. He said the consolidation would align the Piper Aircraft name with other leading Bangor Punta companies, including Smith & Wesson, Starcraft Company, and Waukesha Motor Company.

> Bangor Punta manufactures a wide variety of recreational vehicles including sailboats, houseboats, snowmobiles, campers, trailers and motor homes. A merger of Bangor Punta and Piper Aircraft would bring Bangor Punta into the light aircraft manufacturing business.
>
> Sales of the combined companies would reach $450,000,000 in fiscal 1969, with approximately $180,000,000, or 40%, in the aircraft, recreational and leisure time fields.

Piper Aircraft Corporation simultaneously issued a similar press release.

These announcements attracted an immediate response from the Securities and Exchange Commission, which felt that the release constituted an offer to sell securities before any registration statement had been filed. Accordingly the SEC instituted an action against Bangor Punta and Piper in the United States District Court for the District of Columbia on May 26, and on the same day the defendants consented to the entry of judgment and the issuance of an injunction prohibiting further releases of a similar nature before Bangor Punta's registration statement and prospectus were filed.

The second occurrence or set of occurrences of which Chris-Craft complains took place between May 14 and May 23, when Bangor Punta purchased 120,200 shares of Piper stock for cash in private transactions. Chris-Craft alleges that on April 7, 1969, the staff of the SEC warned Chris-Craft's top executives that continued cash purchases of Piper stock while Chris-Craft's own exchange offer was outstanding, as the first one then was, would be regarded by the SEC as a violation of Rule 10b-6, which prohibits

an issuer from purchasing securities while still participating in their distribution. Chris-Craft did refrain from further purchases during the remainder of its first tender offer and all of its second. Bangor Punta's purchases of stock between May 14 and May 23 occurred while its exchange offer was outstanding if one assumes that the May 8 press release constituted an offer to sell, as the SEC charged that it did. Bangor Punta states that although the SEC knew of its cash purchases at the time the consent decree was discussed, May 23 to May 26, the SEC nonetheless failed to challenge these purchases or ask for their rescission. However, it is undisputed that the SEC announced publicly its position on such purchases in a press release issued May 5.

Bangor Punta's exchange offer closed on July 29, and Chris-Craft's second offer ended August 4. At that time Bangor Punta held 45% of Piper's stock, and Chris-Craft held 40%. By the time this case came to argument on appeal, Chris-Craft had increased its holdings to 46.2% of Piper's common stock, while Bangor Punta had finally acquired a majority with 52.7%.

Chris-Craft commenced the present lawsuit on July 22, 1969, seeking a preliminary injunction which would order Bangor Punta (1) to offer the right to rescind to all persons who had tendered Piper shares to Bangor Punta persuant to its exchange offer, (2) to refrain from acquiring further Piper shares, (3) to refrain from effecting a merger of Piper and Bangor Punta, and (4) to refrain from voting the 120,200 Piper shares acquired for cash between May 16 and May 23, 1969. The district court denied Chris-Craft's motion for a preliminary injunction, citing both the lack of any irreparable injury to Chris-Craft if the motion were denied and the lack of any illegal behavior

on the part of Bangor Punta. Chris-Craft then sought and received an expedited appeal to this court.

The Preliminary Injunction

We agree with the district court that a preliminary injunction is not warranted. A preliminary injunction should issue only when it is needed "as an equitable policing measure to prevent the parties from harming one another during the litigation," *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738, 742 (2 Cir. 1953). It is apparent that here there is no threat that unless an injunction issues before trial "the plaintiff will suffer harm that cannot be repaired." *Studebaker Corp.* v *Gittlin*, 360 F.2d 692, 698 (2 Cir. 1966). Counsel for Bangor Punta has orally stipulated at argument that no merger between that company and Piper will be effected before the end of this litigation, so that no injunction restraining a merger is needed. We do not see, and Chris-Craft does not suggest, what other irreparable harm might result from Bangor Punta's voting the 120,200 shares acquired for cash in May.

Absent any such prejudice from the voting of the stock we do not see how harm to plaintiff can result from refusing to order before the merits of the case are adjudicated after a trial a divestiture or rescission of stock acquired by Bangor Punta during its exchange offer. Indeed, to "give to a plaintiff all the actual advantage which could be obtained by the Plaintiff as a result of a final adjudication of the controversy in favor of the plaintiff" would be clearly inequitable under such circumstances. *Selchow & Richter Co.* v. *Western Printing & Lith. Co.*, 112 F.2d 430, 431 (7 Cir. 1940). We also understand counsel for Chris-Craft to admit on oral argument that because of its complexity an order for rescission or divestiture should be worked out only at trial.

Finally, we conclude that the district court did not err in refusing to enjoin the continued solicitation of stock by Bangor Punta. At that time Chris-Craft was free to compete equally with Bangor Punta for the remaining Piper shares, and it did so. We do not understand Chris-Craft to allege that prior misdeeds of Bangor Punta so determined the course of the competition for shares after the date of the decision below that Chris-Craft was placed at any real disadvantage. Consequently, we affirm the denial of the preliminary injunction.

However, we also feel compelled to pass on the district court's alternative holding that Bangor Punta did not violate the securities laws, for it is clear that this ruling below would determine the outcome of the trial on the merits. On this issue we disagree with the district court.

The May 8 Press Releases

Section 5(c) of the Securities Exchange Act of 1933, as amended, states in part that:

> (c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security . . . .

Section 5(b) of the Act provides that offers to sell may be made after the registration statement is filed, but before it becomes effective, provided the offers are made by specified means which include the use of a prospectus meeting the requirements of Section 10.

The Securities and Exchange Commission has promulgated Rule 135 to exempt certain disclosures of forthcoming

issuances from the definition of an "offer to sell" prohibited by Section 5(c). This Rule reads in relevant part as follows:

> (a) For the purposes only of section 5 of the Act, the following notices sent by an issuer in accordance with the terms and conditions of this rule shall not be deemed to offer any security for sale:
>
> • • • • •
>
> (2) A notice to any class of security holders of such issuer or of another issuer advising them that it proposes to offer its securities to them in exchange for other securities presently held by such security holders;
>
> • • • • •
>
> (b) Such notice shall be sent not more than 60 days prior to the proposed record date for determining the security holders entitled to subscribe to the securities or, if there is no such record date, not more than 60 days prior to the proposed date of the initial offering of the securities.
>
> (c) The notice shall state that the offering will be made only by means of a prospectus which will be furnished to such security holders or employees, as the case may be, and shall contain no more than the following additional information:
>
> (1) The name of the issuer;
>
> (2) The title of the securities proposed to be offered;
>
> • • • • •
>
> (4) In the case of an exchange offering, the name of the issuer and the title of the securities to be sur-

> rendered in exchange for the securities to be offered, the basis upon which the exchange is proposed to be made and the period during which the exchange may be made, or any of the foregoing;
>
> • • • • •
>
> (6) Any statement or legend required by State law or administrative authority.

Chris-Craft argues, and the argument is supported by the SEC, both in its action filed May 26 against Bangor Punta and in its *amicus curiae* brief in this court, that the categories of information privileged under the Rule are exclusive. In view of this exclusivity they contend that as the rule does not mention disclosure of the value of the securities to be offered, Bangor Punta's and Piper's announcements that the package of securities offered by Bangor Punta would be valued at $80 oversteps the exemption and makes the press release an offer to sell.

We agree with this contention. When it is announced that securities will be sold at some date in the future and, in addition, an attractive description of these securities and of the issuer is furnished, it seems clear that such an announcement provides much the same kind of information as that contained in a pospectus. See *SEC* v. *Arvida Corp.*, 169 F. Supp. 211 (SDNY 1958). Doubtless the line drawn between an announcement containing sufficient information to constitute an offer and one which does not must be to some extent arbitrary. A checklist of features that may be included in an announcement which does not also constitute an offer to sell serves to guide the financial community and the courts far better than any judicially formulated "rule of reason" as to what is or is not an offer. Rule 135 provides just such a checklist, and if the Rule is not construed

as setting forth an exclusive list, then much of its value as a guide is lost.

Moreover, it is reasonable to conclude that the assigning of a value to offered shares constitutes an offer to sell. One of the evils of a premature offer is its tendency to encourage the formation by the offeree of an opinion of the value of the securities before a registration statement and prospectus are filed. There is then no information on file at the SEC by which the Commission can check the accuracy of the information which forms the basis of the offeror's estimate of value, and any offeree, such as the reader of a press release, is encouraged to form a premature opinion of value without benefit of the full set of facts contained in a prospectus.

Here a statement of the value of the securities Bangor Punta offered was made directly in the announcement. It is true that the value which the reader of the May 8 press releases could be expected to accept is a value based upon the opinion of a reputable financial corporation and not upon general and necessarily speculative facts about the nature of the offeror's business, as in *Arvida, supra.* However, the true significance of the $80 value which Bangor Punta claimed for its securities package was nonetheless unclear. Chris-Craft charges that the figure constituted an outright misrepresentation inasmuch as most readers would construe the figure as representing the market value of the package. In fact, Chris-Craft charges, some of the securities in the package had not previously been sold on the market at all, and the market value of Piper shares never reached $80 in response to the Bangor Punta exchange offer, so that the Bangor Punta securities did not have an $80 market value and could not honestly have been thought to have such a value. We need not reach the question whether prudent investors would have so construed the $80

value or whether it would have been assumed, as was apparently the case, that the value referred to was based on such considerations as Bangor Punta's earnings and asset value as well as upon the sales price of the securities. It is enough to point out that under either construction the SEC had no way of checking the honesty of the figure, and that the public did not receive the detailed information it would have received from a prospectus issued after a registration statement had been filed. Such information would have eliminated the possibility, perhaps the probability, that some persons would have construed the $80 figure as referring to market value when that value was neither accurate nor intended.[1]

Bangor Punta and Piper argue that even prior to the filing of a registration statement an immediate disclosure of market value is compelled in cases such as this both by *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2 Cir. 1968), *cert. denied as to issues not pertinent here*, sub nom. *Coates* v. *SEC*, *Kline* v. *SEC*, 394 U.S. 976 (1969), and by the rules of the New York Stock Exchange. We do not agree. The only material fact in this case within the meaning of *Texas Gulf Sulphur* was Bangor Punta's commitment to offer its securities for Piper Aircraft shares. Rule 135 provides adequately for the announcement of a material fact such as this; further disclosure would, as stated above, thwart other policies of the securities laws. Had Bangor Punta observed Rule 135 by revealing immediately its intention to make an exchange offer and by later revealing the titles of the securities it proposed to offer and the basis or ratio on which the exchange was proposed to be made as soon as

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[1] The prospectus which Bangor Punta later issued contained a complete description of the securities it was offering for Piper stock, including the over-the-counter sales price of those securities to which such a price was applicable.

these matters were decided, adequate information concerning the proposed transaction would have been placed before the public and the potentially misleading estimate of value would have been avoided.[2] Even if we assume that knowledge of the value figure involved here might conceivably have conferred some benefit on insiders had it not been revealed, we feel that this risk of unfair advantage is outweighed by the danger that substantial numbers of investors were misled by the figure's publication. The fact that a few additional sophisticated investors could have discovered the $80 value guarantee in the description of the transaction which Bangor Punta filed with the SEC pursuant to Section 13(d) of the 1934 Act is of no moment. Such investors would almost certainly be small in number, and any arguable danger of permitting them an unfair advantage is outweighed by the stronger probability that the press release misled a large number of unsophisticated investors.

The same principles apply to the New York Stock Exchange's requirement[3] that insiders disclose information likely to affect the market unless such information can be restricted to a small group of top management officials. In any event, a policy of the New York Stock Exchange, although entitled to considerable respect, cannot bind the Commission or the courts. *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963). To hold that disclosure would be privileged here because the $80 value could not be kept secret and might affect the market would mean that many other companies could offer to sell securities before their registration by claiming that the terms of the proposed offer could not be kept totally secret and must

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[2] See, generally, SEC Release No. 33-5009 (Oct. 7, 1969).

[3] New York Stock Exchange Co. Manual, Section A2.

therefore be disclosed in full. Consequently we hold that the May 8 press release by Bangor Punta violated Section 5(c) and therefore we remand the action to the district court for it to consider in light of this opinion and with the benefit of any further evidence which the parties may present at trial what the most suitable remedy for the violation might be.

Bangor Punta's Purchases of Stock During Its Exchange Offer

Rule 10b-6 forbids "any person . . . (2) who is the issuer or other person on whose behalf . . . a distribution is being made . . . to bid for or purchase for any account in which he has a beneficial interest, any security which is the subject of such distribution . . . or any right to purchase any such security . . . ."

On May 5, 1969, before the purchases of which Chris-Craft complains, the SEC issued release No. 34-8595, announcing a proposed Rule 10b-13. This Rule, which did not become effective until November 10, 1969, reads in part as follows:

> (a) No person who makes a cash tender offer or exchange offer for any equity security shall, directly or indirectly, purchase, or make any arrangement to purchase, any such security (or any other security which is immediately convertible into or exchangeable for such security), otherwise than pursuant to such tender offer or exchange offer, from the time such tender offer or exchange offer is publicly announced or otherwise made known by such person to holders of the security to be acquired until the expiration of the period, including any extensions thereof, during which securities tendered pursuant to such tender offer or

> exchange offer may by the terms of such offer be accepted or rejected; . . . .

The SEC announced in the same release that Rule 10b-13 served only to restate law which already existed:

> This provision is, in effect, a codification of existing interpretations under Rule 10b-6, which among other things, prohibits the person making a distribution from bidding for or purchasing the security being distributed or any right to acquire that security. These interpretations have pointed out that the security to be acquired in the exchange offer is, in substance, either a right to acquire the security being distributed or is brought within the rule under paragraph b thereof; and Rule 10b-6 prohibits the purchase of such security during the distribution except through the exchange offer, unless an exemption is available.

Despite the reference in the Release to "a codification of existing interpretations under Rule 10b-6," neither the SEC nor the parties to this action have cited any such precedents, nor have we found any. However, we do not find this lack of precedent crucial if Rule 10b-6 should independently be found to apply to purchases of stock while exchange offers for such stock are outstanding.

One of the primary purposes of Rule 10b-6 is to prevent an issuer of stock from manipulating the market for that stock. As the court stated in *SEC* v. *Scott Taylor & Co.*, 183 F. Supp. 904, 907 (SDNY 1959):

> Manipulation was often accomplished by those about to sell securities or already engaged in selling securities bidding on the market for the same securities, thereby

> creating an unjustifiable impression of market activity which would facilitate the sale at artificially high prices. This was one of the practices which the Securities Exchange Act was designed to eradicate, and it is the practice which is covered by Rule X-10b-6. (Footnote omitted.)

See also, *Weitzen* v. *Kearns*, 271 F. Supp. 616, 623 (SDNY 1967), *Miller* v. *Steinbach*, 268 F. Supp. 255, 280 (SDNY 1967); *SEC* v. *Electronics Security Corp.*, 217 F. Supp. 831, 836 (D. Minn. 1963).

Bangor Punta argues that its purchase of Piper stock could only serve to drive up the price of Piper stock and thus to make the Bangor Punta shares offered in exchange appear less attractive—the opposite effect from that which Rule 10b-6 would normally seek to prevent. However, this argument overlooks the decided benefits that purchases of target company stock can produce for the initiator of an exchange offer. If the price of the target company's stock does increase in response to cash purchases by the exchange offer or after the offer has been announced, many shareholders in the target company are likely to assume that the price increase results solely from the bullish effect of the exchange offer on the market. Small investors especially would be likely to assume that the exchange offer was receiving serious attention and approbation from larger, more knowledgeable investors than they. The managements of either the target company or the offeror can compound this impression by announcing the number of shares of target stock acquired by the offeror since the initiation of the exchange offer. Absent some indication to the contrary, the target company shareholders would be likely to assume that the entire increase resulted from the offer, not from cash purchases in addition to the offer.

Prevention of this kind of manipulation seems well within the spirit of Rule 10b-6. It is within the letter of the Rule as well. As quoted above, part (a) of Rule 10b-6 prohibits the issuer of a security not only from purchasing the issued security itself while offering it, but also from purchasing "any right to purchase any such security." Here the Piper shares carried the right to acquire Bangor Punta securities as a result of Bangor Punta's exchange offer. Consequently, we hold that Bangor Punta could not lawfully purchase these shares during the tenure of its exchange offer.

It remains open to Bangor Punta to demonstrate at trial that its purchases fall within the exemption provided by Rule 10b-6 for "unsolicited . . . purchases . . . effected neither on a securities exchange nor from or through a broker or dealer . . . ." Moreover, we do not pass any judgment at this time on the question of what remedy is appropriate in regard to Bangor Punta's unlawful purchases of stock, nor on the significance of the fact that Chris-Craft itself purchased stock during an exchange offer prior to the SEC's warning.

We remand for further proceedings not inconsistent with this opinion.

MOORE, *Circuit Judge* (concurring in part):

I concur in the affirmance of the order denying a preliminary injunction. Under customery procedure, the issues framed by the pleadings would come on for trial. Upon such facts as might be developed upon such a trial and the conclusions of law found to be applicable thereto, the case would come before us on appeal. In this case, however, the majority, in effect, give their conclusions of law before trial and appeal.

Quite apart from giving the trial court an opportunity to fulfill its role in arriving at a decision, the majority, in their advisory opinion, misconstrue, I believe, the May 8th press release and Rule 135.

There should be little doubt that if the May 8th agreement had been misstated, a suit, alleging misrepresentation and fraud, would be before us. And yet any omission of the all important terms proposed would have been materially misleading. The exchange was to be for "Bangor Punta securities and/or cash having a value, in the written opinion of The First Boston Corporation, of $80 or more." This was "the basis upon which the exchange is proposed to be made," Rule 135(c)(4). The "offer to sell" exemption required this information. The most important element of "basis" was, of necessity, some indication as to value. $80 in cash needed no evaluation; the package of securities, not then final, had to have some equivalent measure. To say, as does the majority, that the "announcements that the package of securities offered by Bangor Punta would be valued at $80 oversteps the exemption and, therefore, makes the press release an offer to sell," turn a preliminary and informative press release, which advises the public of a forthcoming registration statement, into a prospectus would—or at least should—come as a shock to the S.E.C.

As to the stock purchases by Bangor Punta during its exchange offer, the age-old question is again presented: does a rule or statute merely codify an existing decision-made rule of law or does it create a new rule? The very fact that Rule 10b-6 was to be quite prospective in operation is rather convincing that the latter is the proper conclusion.

In summary, I would affirm on the only issue before us, the denial of a preliminary injunction, and would withhold

any other opinions until we have an opportunity to pass upon such future appeal as may come before us in this case.

ANDERSON, *Circuit Judge* (concurring):

I concur in the affirmance of the order of the District Court, and in Judge Waterman's discussion of Rule 10b-6. I also concur in the holding that on May 8, 1969, the appellees were neither required nor permitted to disclose more than the fact of Bangor Punta's commitment to make an exchange offer of its securities to the Piper shareholders as part of an agreement to purchase the holdings of the Piper insiders, since the titles of Bangor Punta securities and the basis or ratio of this exchange were not yet established. For the reasons there expressed, the policies of regulation common to the federal securities laws require this resolution of the conflict between openness and reticence in disclosing specific details which is implicit in the dictates of the Securities Exchange Act of 1934 and the Securities Act of 1933.

I would not concur, however, in any interpretation of the opinion which might be thought to suggest that disclosure of information relating to the $80 valuation estimate, specified in the insiders' sale agreement, would not be required under any circumstances because it would fail to satisfy the 1934 Act's standard of materiality, regardless of whether supervening restrictions of the 1933 Act are applicable. As Chief Judge Lumbard's dissent notes, the additional fact that Bangor Punta had committed itself to offer securities valued by a well-known investment banking firm at not less than $80 per Piper share, and to back this commitment with a conditional guarantee of the value of the securities already offered to the Piper insiders, might fall within the investor-oriented definition of materiality set out in relation to disclosure required by §10(b) of the 1934 Act and Rule 10b-5 in *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (2 Cir. 1968), cert. denied sub nom. *Coates* v. *SEC*, 394 U.S. 976 (1969). The Court's holding, in which I concur, is simply that the possible application of disclosure principles discussed in that case is here "outweighed by the danger that substantial numbers of investors were misled by the figure's publication" in a manner violating Rule 135.

Were it necessary to consider the application of materiality tests to the $80 value term, the fact could not be overlooked that Rule 10b-5 applies to the disclosure of all material "information," 401 F.2d at 848, a category of data which may include some "matters which do not fall tidily into either the 'fact' or 'opinion' class." A. Bromberg, *Securities Laws: Fraud—SEC Rule 10b-5*, §7.4(6)(d), p. 187 (1969). But this case does not turn upon either the validity of the distinction between a material "event" and a mere "prediction or opinion" suggested in SEC Release No. 5009 (Oct. 7, 1969), or upon its application to these facts.

LUMBARD, *Chief Judge* (dissenting):

I dissent.

Although I agree with the majority's conclusion that a preliminary injunction is not warranted in this case, I cannot accept the interpretation given by my colleagues to those provisions of the securities laws invoked against Bangor Punta. In my view Judge Tenney was substantially correct in his rulings below, and his order should be affirmed.

This case turns on two events, the issuance of the May 8 press release and Bangor Punta's purchases of 120,200

shares of Piper stock from May 12 through May 24. I think that Bangor Punta acted properly in both situations. Not only was the May 8 release proper, but the parties could have done no less, for I read recent interpretations of the securities laws as imposing an affirmative obligation to disclose the matters announced in the release. As to the purchases of the 120,200 shares, Bangor Punta did not then know of any rule or interpretation precluding the transactions, and the Commission has at least twice passed up opportunities to enforce its "long-established" interpretation of 10b-6 against Bangor Punta. Although it was aware of the purchases when it was preparing its suit in the District Court for the District of Columbia, the SEC made no mention of them in the pleadings nor sought to enjoin Bangor Punta from further purchase in the consent decree. Later, the Commission approved Bangor Punta's registration statement without requiring any disclosure of alleged violations of 10b-6. For the SEC now to take the position that Rule 10b-6 prohibited the purchases represents a complete reversal of the position it had taken towards Bangor Punta until now.

1. *Section 5(c) and Rule 135*

It was entirely proper for Bangor Punta to enter into the May 8th agreement with the Piper family, as the family had every right to choose between takeover by Chris-Craft, Bangor Punta, or any other group.

Bangor Punta agreed to use its best efforts to acquire more than 50% of the Piper Common Stock. As "a part of such best efforts," it promised to "take all steps necessary to make a further exchange offer to all holders of Piper Stock . . ."; each share was to be exchanged for Bangor Punta securities or cash "having a value, in the written opinion of the First Boston Corporation, of $80

or more . . . ." There was a similar provision to safeguard the Pipers in that they would received consideration worth at least $80. Thus, as they well may have had a right to expect, the other shareholders of Piper were assured substantially equal treatment to that received by the Piper family. See *Perlman* v. *Feldmann,* 219 F.2d 173 (2d Cir. 1955); Andrews, The Stockholder's Right to Equal Opportunity in the Sale of Shares, 78 Harv. L. Rev. 505 (1965).

Bangor Punta and Piper immediately notified the Stock Exchange of this agreement and issued a press release on May 8. I think Judge Tenney was correct in holding that the press release was consonant with the exchange guidelines for announcing material corporation developments and with the mandate of *SEC* v. *Texas Gulf Sulphur,* 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969).

In *Texas Gulf,* we reiterated our view that the securities laws should advance "the justifiable expectation of the market place that all investors trading on impersonal exchanges have relatively equal access to material information . . . ." 401 F.2d at 848. It seems clear that if this principle is to be honored, the agreement with forty members of the Piper family, in conjunction with the decision to launch a tender offer, was material information requiring disclosure.

The majority intimates that the $80 figure was not a material fact, a suggestion with which I cannot agree. The test for materiality laid down in *Texas Gulf* is whether the fact is one to which "[a] reasonable man would attach importance . . . in determining his choice of actions in the transaction in question." 401 F.2d at 849. On May 8 Chris-Craft was offering $65 for each Piper share in a taxable exchange; no reasonable man holding Piper shares on that date would find "unimportant" the fact that Bangor

planned to offer, in the near future, a considerably more attractive package of securities, with a value of approximately $80.

To me, however, finding the fact material does not in every case compel disclosure, for the need for equal access to information does not automatically override competing policies of the securities laws as embodied in other statutory provisions and well-established regulations. Here, Rule 135 advances the basic principle that the prospectus and registration statement shall be the primary source of information during and before a contemplated offering, and only limited kinds of information can be released prior to filing.

The task of harmonizing regulations based on competing policies should of course be left to the SEC in the first instance. But when, as here, the Commission refuses even to recognize the existence of a conflict, we must strike the balance. Fortunately, our task here is not difficult, for there is language in Rule 135 which when read in the light of *Texas Gulf* authorizes the announcement.

Most of the May 8th announcement—the fact of the offering, the proposed date—was clearly authorized by Rule 135. While the $80 figure may seem more difficult to justify, under the circumstances its announcement was the only course open to Bangor Punta. Responding to the problem of valuation, Rule 135(c)(4) provides for notification of "the basis upon which the exchange is proposed to be made. . . ." Although not free from doubt, in the light of *Texas Gulf* I would read this provision as permitting announcement of the $80 figure.

The need for fair and equal access to information about the terms of a tender offer must be balanced against premature and incomplete disclosure of a securities offering in

contravention of the registration and disclosure requirements underlying the 1933 Act. The conflict is sharply posed when, as here, the merger agreement sets only a value for the exchange package, with the underlying securities left to be determined later. When the securities to be offered are not specified at the time of the announcement, the investing public cannot even begin to make an independent evaluation of the offer[1] and perforce may tend to react significantly but blindly to the unsupported dollar sum. Also, I realize there is a possibility for abuse, with companies employing this manner of agreement in order to gain the advantages of "jumping the gun."

Despite these considerations, it seems to me that here the need for disclosure was paramount. In addition to the forty members of the Piper family and their agents, a large group of persons employed by independent firms, including accountants, escrow agents, banks, and printers, would of necessity work on the Piper agreement and so learn of the news. Not bound as insiders[2] or by the restraints of corporate trust imposed on employees of Piper and Bangor Punta, they would be free to trade upon this information, and with Piper trading at a considerably lower price on May 8, their response is easily foreseen. Even if under some legal or moral duty of restraint, a group this large could not be effectively policed or controlled. Further, the figure would rapidly spread; a dollar sum speeds the rumor

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[1] This situation must be distinguished from an agreement stipulating that the undetermined securities are to have a certain cash value. This can occur when the tendering company promises to offer only widely traded securities in its package; then, the market price of widely traded securities as of the date the exchange becomes effective determines the exchange ratio. There, the public is fully protected, and I can see no arguments against full and immediate disclosure.

[2] The status of "insiders" as to all these people has not yet been established and would raise difficult questions of enforcement.

as it is easily remembered and easily transmitted. Finally, Piper stockholders, thus apprised by the May 8 release of what they might receive if they held their shares rather than tendering to Chris-Craft, clearly benefited from the disclosure.[3] Chris-Craft can hardly complain that it was placed at a disadvantage by reason of Bangor Punta's higher bid and its ability to pay more; thus the law of the market place benefits the stockholders whose shares are sought.

On petition for rehearing, another factor compelling disclosure has been called to our attention. The so-called "tender offer" provision, section 13d-1 of the Securities Act of 1934, required Bangor Punta to file a detailed description of the May 8 agreement with the SEC within ten days, by May 18th. When timely filed, the description in accordance with section 13d-1 disclosed as an essential element of the Agreement that Bangor Punta planned a registered offer to the public shareholders of Piper, the offer to consist

> "of cash and/or securities having a value of at least $80 per share. Such value to be determined by The First Boston Corporation . . . ."

This wording is virtually identical to the May 8 announcement.

The 13d-1 statement was placed in the public files of the Commission, a repository over which, it is not unreasonable to assume, the keener investment houses maintain a close scrutiny. Thus, even if it be assumed that no "leaks" of the sort described above would have occurred, sophisticated investors within a few days would have obtained the $80 figure merely by a careful perusal of public records. The policies behind *Texas Gulf* command that such imper-

[3] Indeed, if the price had not been announced, a Piper stockholder who tendered his shares to Chris-Craft during the interim might well have grounds for an action against Bangor Punta and Piper.

fect dissemination be corrected by broad disclosure through the public media, and Rule 135 must be read so as to permit such a course of action.

It is one thing to recognize the competing considerations and attempt to find a balanced solution and quite another to state flatly, as does the SEC, that the companies are under no duty to disclose. In its *amicus* brief, the Commission argues that Piper and Bangor Punta had no duty even to announce the fact of the agreement, let alone the price, since neither they nor any of their insiders were going to trade in the shares involved. I find this position wholly unrealistic and hardly designed to protect the other Piper stockholders. Simply put, Bangor Punta and Piper realized they were faced with one of "those situations which are essentially extraordinary in nature and which are reasonably certain to have a substantial effect on the market price of the security if [the extraordinary situation is] disclosed." *SEC* v. *Texas Gulf Sulphur,* 401 F.2d 833, 848. Disclosure was required.

Unlike the SEC, the New York Stock Exchange has tried to chart a course which accommodates the competing considerations. A Stock Exchange Rule adopted on July 18, 1968 in the wake of *Texas Gulf* in part provides:

> Negotiations leading to acquisitions and mergers, stock splits, the making of arrangements preparatory to an exchange or tender offer . . . are the type of developments where the risk of untimely and inadvertent disclosure of corporate plans is most likely to occur. . . .
>
> At some point it usually becomes necessary to involve other persons to conduct preliminary studies or assist in other preparations for contemplated transactions. . . . Experience has shown that maintaining security at this point is virtually impossible. Accord-

> ingly, fairness requires that the Company make an immediate public announcement as soon as confidential disclosures relating to such important matters are made to "outsiders."
>
> The extent of the disclosures will depend upon the state of discussion, studies, or negotiations. So far as possible, public statements should be definite as to price, ratio, timing and/or any other pertinent information necessary to permit a reasonable evaluation of the matter. As a minimum, they should include those disclosures made to "outsiders" . . . .

NYSE Company Manual A-19 (July 18, 1969) (Addendum at 19-20). This standard seems to me a realistic solution to the problem.

I would hold that the May 8 announcement was proper, reflecting a fair accommodation of Section 5(c) and Rule 135 and the obligation to disclose material facts.

2. *Rule 10b-6*

Nor would I find that any violation of Rule 10b-6 was occasioned by Bangor Punta's purchases of 120,200 shares of Piper stock between May 14 and May 23. To reach these transactions, the majority would stretch the wording of 10b-6 beyond anything that courts, commentators, and—in published actions—the SEC had considered included until this case.

Rule 10b-6 seeks to prevent the manipulation of the price of shares which are the subject of a current or impending public offering. It is concededly a highly technical rule, and, as the Commission explicitly noted at its adoption, it covers only a limited number of undesirable practices:

> The Rules [10b-6, -7, -8] do not purport to cover every possible type of manipulation or deceptive activity.

> The fact that a particular activity is not specifically dealt with or prohibited in such rules does not necessarily mean that it is not unlawful under the Act or the Commission's other rules.

SEC Securities Act Release No. 5194 (July 5, 1955). The practice particularly condemned is the offering company purchasing its own shares on the market, thereby buoying up the market price close to that set in the public offering. As is so often the case in the field of securities laws, there are a host of other, closely related transactions having the same manipulative effect on the tender offer which are also barred by the Rule. For example, section (b) controls the situation where the offering in prospect involves warrants; there, the issuer cannot purchase those of its shares represented by the rights. It seems to me improper to extend this sort of technical, limited and consistently interpreted rule to a common practice which until now has never been thought within its ambit.

As an original matter, it might be desirable to prohibit a tendering company from purchasing the target company's shares, but the proper way to accomplish this end, taken by the Commission with its new Rule 10b-13, is to adopt a new rule rather than stretch an established one beyond its recognized bounds. The Commission, however, seems not to have been content to wait until 10b-13 became effective to enforce its new policy. Rather, it invoked 10b-6 during the interim by a boot-strap operation, claiming in the release announcing 10b-13 that the proposed rule was "in effect, a codification of existing interpretations under Rule 10b-6. . . ." I sympathize with the Commission's dilemma when, having announced a new policy, it cannot reach current transactions until the new rule becomes effective. But it seems to me that the cost of waiting will rarely be too great as the Commission presumably has lived with the

offending practice for years; it expects us to make bad law to bail it out.

My belief that 10b-6 is being invoked here merely as a stop-gap measure is strengthened by several factors. Although the Commission claims that its position reflects consistent staff practice, I have found no published interpretations, either administrative or judicial, before the Release accompanying proposed Rule 10b-13 that indicate the Commission's view that 10b-6 reaches the shares of a target company. And discussions of the phrase "rights to purchase any such security" and of section 10b-6(b) by the commentators have been directed exclusively to the situations involving two securities of the same company, such as the distribution of a convertible debenture coupled with purchases of the underlying security. *See, e.g.*, Comment, The SEC's Rule 10b-6: Preserving a Competitive Market During Distributions, 1967 Duke L.J. 809, 831; Disclosure Requirements of Public Companies and Insiders 138-42 (Flom, Garfinkel & Freund ed. 1967).

Significantly, the SEC did not see fit to apply its interpretation of 10b-6 to Bangor Punta, although it knew of the May purchases.[4] The final paragraph of the consent

[4] It may well be that the Commission's course of action was prompted by internal confusion. While Chris-Craft was warned on April 7th that the Commission would consider purchase of Piper stock while its tender offer was pending a violation of 10b-6, no such warning was ever communicated to Bangor Punta. When Chris-Craft abided by this prohibition, the Commission may have felt that its error had given Bangor Punta an inequitable advantage which it ought to seek to correct by the position it has taken in its amicus brief. I do not feel, however, that Bangor Punta—an equally innocent party—should be made to suffer for any failure on the part of the Commission or its staff. In any event, Bangor Punta acted within the law and consistent with the rulings of the SEC with respect to Rule 10b-6.

decree, entered on May 26, does not prohibit Bangor Punta from acquiring Piper stock other than through the exchange offer. Nor did the SEC require Bangor Punta to include an appropriate disclosure in its prospectus, as it clearly had the power to do,[5] of an alleged violation of its Rules, although Bangor Punta did mention the May purchases. Thus, I feel the SEC's own conduct casts doubt on its claim that "the Commission's staff has so construed the rule in similar situations."

Rule 10b-6 has until this case been a limited, highly technical rule. Despite the fact that a change in Commission policy cannot be put into effect for several months because of the procedural safeguards of the Administrative Procedure Act, the Commission now claims that we must reach the same result by accepting its interpretation, i.e., that the rule has meant this all along. I cannot believe that this practice is consonant with the standards of due process and elemental fairness long engrained in the operation of administrative law.

Since I conclude that Bangor Punta's purchases do not fall within the ambit of Rule 10b-6 as consistently interpreted and universally understood as of May, 1969, and I do not believe the May 8th announcement was in violation of the securities laws, I would affirm Judge Tenney's opinion below.

[5] *See, e.g.*, Northwest Industries Registration Effective, SEC News Digest, Issue No. 69-73 (April 17, 1969).

CHRIS-CRAFT INDUSTRIES, INC.,
Plaintiff,

v.

PIPER AIRCRAFT CORPORATION
et al., Defendants.

No. 69 Civ. 2227.

United States District Court
S. D. New York.
Aug. 19, 1969.

Paul, Weiss, Goldberg, Rifkind, Wharton & Garrison, New York City, Arthur L. Liman, Sidney S. Rosdeitcher, Joseph J. Ackell, Alan L. Schlosser, New York City, of counsel, for plaintiff.

Chadbourne, Parke, Whiteside & Wolff, New York City, Donald L. Deming, Richard B. Leather, Zachary Shimer, New York City, of counsel, for defendant Piper Aircraft Corp. and individually named members of Piper family.

Webster, Sheffield, Fleischmann, Hitchcock & Brookfield, New York City, James V. Ryan, New York City, William L. D. Barrett, Nancy Pasley, of counsel, for Bangor-Punta Corp.

OPINION

TENNEY, District Judge.

The instant suit arises out of the protracted and often bitter contest between plaintiff Chris-Craft Industries, Inc. (hereinafter referred to as "Chris-Craft") and defendant

Bangor Punta Corporation (hereinafter referred to as "Bangor Punta") to gain control of defendant Piper Aircraft Corporation (hereinafter referred to as "Piper"). Alleging various violations by defendants of the Securities Act of 1933 and the Securities Exchange Act of 1934 and the Rules promulgated with respect to each such Act, Chris-Craft seeks an injunction *pendente lite* restraining Bangor Punta from: (1) accepting 107,574 shares of Piper common stock tendered by the public shareholders of Piper to Bangor Punta pursuant to the terms of Bangor Punta's General Exchange Offer of July 18, 1969. Chris-Craft urges that these shareholders be given the opportunity to rescind their tenders after a "full and fair disclosure" has been made of the terms of Bangor Punta's exchange offer; (2) acquiring additional shares of Piper; (3) effecting a merger or consolidation of Bangor Punta and Piper; and (4) voting 120,200 shares of Piper purchased in May 1969 by Bangor Punta in five large cash transactions, effected neither on a securities exchange nor from or through a broker or dealer.

Piper is a publicly-held Pennsylvania corporation whose capital stock consists of 5,000,000 authorized shares of $1.00 par value common stock, of which approximately 1,641,890 shares are issued and outstanding. The Piper family, three of whom are members of Piper's Board of Directors and defendants herein, own approximately 501,090 of the 1,641,890 outstanding shares. Piper's stock has been listed on the New York Stock Exchange (hereinafter referred to as "the Exchange") since 1957.

Chris-Craft is a diversified manufacturer whose common and preferred stock and convertible debentures are traded on the Exchange. Bangor Punta is a publicly-held diversified corporation whose stock and bonds are also listed on the Exchange.

In January 1969 Chris-Craft, in an effort to gain control of Piper, began acquiring shares of Piper on the open market. On January 23, 1969, Chris-Craft publicly announced its interest in Piper and made a public tender offer for up to 300,000 shares of Piper stock at $65.00 per share with the "right to purchase excess shares."

Piper's Board of Directors, by letter dated January 27, 1969, advised Piper stockholders that in their opinion Chris-Craft's offer was inadequate and not in the best interests of Piper shareholders. Unsatisfied with the history of Chris-Craft's management, Piper's management and Board of Directors decided that the best interests of Piper and its shareholders required them to resist this attempted takeover.

On January 30, 1969, the Board of Directors of Piper and the Grumman Aircraft Engineering Corporation (hereinafter referred to as "Grumman") approved an agreement whereby Piper would sell 300,000 of its authorized but unissued shares to Grumman for $65.00 per share, in contemplation of thereafter exploring the possibility of a merger with Grumman. This agreement, although never realized, adversely affected Chris-Craft's cash tender offer, which expired on February 3, 1969.

On February 27, 1969, Chris-Craft filed a proposed registration statement and prospectus with the Securities and Exchange Commission (hereinafter referred to as "the SEC") in which it proposed to offer to exchange certain Chris-Craft securities for up to 300,000 shares of Piper.

Pursuant to its continuing efforts, on March 24, 1969 Piper issued 320,000 shares of its authorized but unissued common stock in exchange for all the outstanding stock of the United States Concrete Pipe Company of Florida, a subsidiary of a publicly-held investment company listed

on the Exchange. At the same time, Piper exchanged 149,199 shares of its authorized but unissued common stock for approximately 99½ percent of the outstanding shares of Southply, Inc., a closely-held Louisiana corporation. The Board of Governors of the Exchange, with whom listing applications covering the issued shares were filed, felt that the distribution of almost 30 percent of Piper's authorized stock violated the Exchange's listing criteria. Accordingly, trading in Piper stock was suspended and delisting proceedings authorized. When Piper's management agreed to rescind these transactions, trading in Piper stock was resumed.

While Piper's prolonged efforts to fend off Chris-Craft raise serious questions as to the propriety of such conduct, this action has little relevance to the instant proceedings. For the issues raised herein relate solely to Bangor Punta's exchange offer of July 18, 1969 and its purchases, for cash, of Piper stock in May 1969.

In early January 1969, defendant First Boston Corporation (hereinafter referred to as "First Boston"), an investment banking firm which serves as financial adviser to Piper, inquired whether Bangor Punta was interested in a possible acquisition of Piper. Although Bangor Punta responded affirmatively, nothing developed at that time. At a meeting convened on February 24, 1969, Bangor Punta explained that it would not consider attempting such an acquisition unless the Piper family sold their 501,090 shares to Bangor Punta. This condition was finally accepted by the Piper family on April 22, 1969.

On May 7, 1969, Chris-Craft publicly announced the terms of its then pending registration statement which proposed an exchange offer of Chris-Craft stock for 300,000 to 400,000 shares of Piper. The following day, after pro-

tracted discussions with Piper's representatives, a final agreement was entered into pursuant to which the Piper family agreed to exchange their shares for *specified* Bangor Punta securities. Additionally, the agreement provided that Bangor Punta would use its best efforts to acquire more than 50 percent of the outstanding shares of Piper stock. As part of those best efforts, Bangor Punta agreed to make an exchange offer to all other holders of Piper stock "under which such holders will be entitled to exchange each share of Piper common stock held by them for Bangor Punta securities and/or cash having a value, in the written opinion of The First Boston Corporation, of $80 or more." The agreement further provided that if Bangor Punta succeeded in acquiring more than 50 percent of the outstanding Piper shares, and if, in the written opinion of First Boston, the value of the shares offered to the members of the Piper family was less than $80.00 on the opening day of the exchange offer, Bangor Punta would deliver to the members of the Piper family securities and/or cash with a value "equal to the difference between $80 and the Exchange Offer Value." No agreement had been reached at that time as to the components of the proposed package of Bangor Punta securities to be offered to the public Piper shareholders.

Later that same day, Bangor Punta and Piper issued identical press releases announcing that they had reached an agreement under which Bangor Punta would acquire the Piper family's interest in Piper and that:

> "Bangor Punta has agreed to file a registration statement with the SEC covering a proposed exchange offer for any and all of the remaining outstanding shares of Piper Aircraft for a package of Bangor Punta securities to be valued in the judgment of the First Boston Corporation at not less than $80 per Piper share."

At that time, Piper stock was selling on the Exchange at approximately sixty dollars.[1]

On May 26, 1969, the SEC instituted an action against Bangor Punta and Piper in the United States District Court for the District of Columbia. Therein, the SEC charged that the May 8th press release was "gun-jumping" in violation of Section 5(c) of the Securities Act of 1933, as amended, 15 U.S.C. § 77e(c),[2] and SEC rule 135. Without admitting any of the allegations of the complaint, Bangor Punta and Piper consented to the entry of a final judgment of permanent injunction which enjoined them, *inter alia,* from offering to sell or from selling either of their securities until a registration statement was filed with the SEC as to such securities.

Bangor Punta filed its registration statement with the SEC covering its exchange offer on May 29, 1969. Included in the filing, as an exhibit to the registration statement, was a copy of the agreement of May 8, 1969. Preliminary prospectuses in the form contained in the registration statement were sent by Bangor Punta to all Piper shareholders of record on the same day the registration statement was filed. It became effective on July 18, 1969 and expired on July 29, 1969.

Bangor Punta now owns 728,864 shares of Piper, or 44.4 percent of its outstanding stock. As a result of its

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[1] Affidavit of John E. Flick, dated August 4, 1969, at 10.

[2] Section 5(c) of the Securities Act of 1933, as amended, 15 U.S.C. § 77e(c), provides:

> "It shall be unlawful for any person, directly or indirectly * * * to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security * * *."

most recent exchange offer, which terminated on August 4, 1969, Chris-Craft has now acquired a total of at least 654,000 shares of Piper, or approximately 39.8 percent of its outstanding shares. With approximately 259,026 shares of Piper still in the hands of the public, it would appear that at this time neither Chris-Craft nor Bangor Punta has succeeded in gaining control of Piper.

[1] Chris-Craft argues that the May 8th identical press releases of Bangor Punta and Piper constituted flagrant violations of Section 5(c) of the Securities Act of 1933, as amended, 15 U.S.C. § 77e(c) and SEC Rule 135, 17 C.F.R. § 230.135, in that no registration statement had been filed with the SEC prior thereto.

Until the actual execution of the May 8th agreement, only top management personnel and their confidential advisors had been advised of the negotiations with Piper. Upon execution, however, it became necessary to involve a great many other persons in the arrangements, such as an indenture trustee, independent auditors, printers, outside counsel and stenographers. Maintenance of security against premature disclosure of the terms of agreement became virtually impossible.[3] Since the $80.00 figure set by the terms of the agreement was substantially above the market price for a share of Piper stock, the opportunity for stock manipulations and unfair dealings in Piper stock by those who may have learned of the agreement prior to its becoming public knowledge was apparent. The May 8th press release would therefore appear both desirable and consonant with the directives of Securities & Exch. Comm'n v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied,* Coates v. Securities & Exch. Comm'n, 394 U.S. 976, 89 S.Ct. 1454, 22 L.Ed.2d 756 (1969). Further,

[3] *Supra* note 1 at 9.

the guidelines for press releases issued by the Exchange on July 19, 1968 support this policy of timely disclosure.

> "Negotiations leading to acquisitions and mergers, stock splits, the making of arrangements preparatory to an exchange, or tender offer, • • • are the type of developments where the risk of untimely and inadvertent disclosure of corporate plans is most likely to occur. Frequently, these matters require discussion and study by corporate officials before final decisions can be made. Accordingly, extreme care must be used in order to keep the information on a confidential basis.
>
> "Where it is possible to confine formal or informal discussions to a small group of the top management of the company or companies involved and their individual confidential advisors where adequate security can be maintained, premature public announcement may properly be avoided. • • •
>
> "At some point it usually becomes necessary to involve other persons to conduct preliminary studies or assist in other preparations for contemplated transactions, e. g., business appraisals, tentative financing arrangements, attitude of large outside holders, availability of major blocks of stock, engineering studies, market analyses and surveys, etc. Experience has shown that maintaining security at this point is virtually impossible. Accordingly, *fairness requires that the Company make an immediate public announcement as soon as confidential disclosures relating to such important matters are made to 'outsiders.'*
>
> "The extent of the disclosures will depend upon the stage of discussion, studies, or negotiations. So far as possible, public statements should be definite as to *price,* ratio, timing and/or any other pertinent information

necessary to permit a reasonable evaluation of the matter. As a minimum, they should include those disclosures made to 'outsiders'." (Emphasis added.) New York Stock Exchange Company Manual at A–19 (July 19, 1968).

Section 5(c) of the Securities Act of 1933 makes it unlawful for any person directly or indirectly, to offer to sell or offer to buy any security unless a registration statement has been filed as to such security. The May 8th press release, however, merely asserts that Bangor Punta has agreed to file a registration statement with the SEC covering a proposed exchange offer for any and all of the remaining outstanding shares of Piper for a package of Bangor Punta securities. On its face, this press release cannot itself be construed as an offer to sell or buy securities. This view is supported by SEC Rule 135, which, in pertinent part, provides:

"(a) For the purposes only of Section 5 of the Act, the following notices sent by an issuer in accordance with the terms and conditions of this rule shall *not* be deemed to offer any security for sale:

• • • • • •

"(2) A notice to any class of security holders of such issuer or of another issuer advising them that it proposes to offer its securities to them in exchange for other securities presently held by such security holders • • •." (Emphasis added.)

Chris-Craft argues further than in addition to Section 5(c) and Rule 135, Rules 10b–5, 17 C.F.R. § 240.10b–5, and 10b–6, 17 C.F.R. § 240.10b–6, forbid a person making an exchange offer from placing a value on the securities being

offered, since any opinion as to value might be self-serving and misleading.

SEC Rule 135 provides that "(a) notice to any class of security holders • • • advising them that it proposes to offer its securities to them in exchange for other securities presently held by such security holders • • • shall contain • • • the name of the issuer and the title of the securities to be surrendered in exchange for the securities to be offered, [and] the basis upon which the exchange is proposed to be made • • •."

Since, as previously noted, the precise components which were to comprise the package of Bangor Punta securities to be offered for each share of Piper had not been determined at the time of the May 8th press release, Bangor Punta and Piper could do no more than set forth the basis upon which the exchange offer was proposed in the same terms as contained in the May 8th agreement. Additionally, since the Exchange's guidelines for press releases prescribed that "[s]o far as possible, public statements should be definite as to price, ratio, timing and/or any other pertinent information necessary to permit a reasonable evaluation of the matter", the reference to the $80.00 figure cannot be deemed unjustified.

Nor can it be said, as Chris-Craft urges, that Piper and Bangor Punta have, by means of the May 8th press release and the latter's preliminary and final prospectuses, deliberately misled the public into believing that Bangor Punta would, in exchange for each share of Piper, tender securities immediately salable for $80.00, in violation of Sections 9, 10(b) and 14(e) of the Securities Exchange Act of 1934 as amended 15 U.S.C. § 78i, 15 U.S.C. § 78j(b), 15 U.S.C. §78n (e), respectively, and of the rules promulgated with respect to each such Act.

On July 18, 1969, First Boston rendered a formal opinion to Bangor Punta and Piper that based on the market and other conditions existing prior to the opening of business on July 18, 1969, the combination of securities provided for in the general exchange offer outlined in the registration statement had a value of not less than $80.00.

Such a determination, of course, is normally not a mechanical task but is essentially a matter of judgment. This evaluation was arrived at by a committee of eleven experienced and knowledgeable personnel. In reaching its collective judgment, the committee met on two different occasions to consider all the facts they deemed relevant. Additionally, over six weeks were spent in preparing the material upon which the committee relied.[4] No persuasive argument has been presented to the effect that the value placed on the package of Bangor Punta securities by First Boston was not reached in good faith. Surely, there is no basis for implying from the May 8th press release that such value would endure for the duration of the exchange offer, or be immediately realizable on any particular day. The vagaries of the marketplace belie such a construction. The value placed on the package may vary from buyer to buyer and from day to day. With this in mind, Bangor Punta specified at two places in its final prospectus, at the insistence of the SEC, that:

> "No guarantee of, or representation as to, the value of the securities offered by Bangor Punta pursuant to the Exchange Offer is or can be made."

"Clear misleading statements need be shown • • • before this court can enjoin a tender offer. • • • In the instant case the plaintiffs have failed to show clear misleading representations in the tender offer or the absence of statements in the tender offer which in combination with other representations would lead to a conclusion that fraud was being perpetrated upon unsuspecting shareholders." Jacobsen Mfg. Co. v. Sterling Precision Corp., 282 F.Supp. 598, 603 (E.D.Wis.1968); Fleischer and Mundheim, Corporate Acquisition by Tender Offer, 115 Penn.L.Rev. 317, 338 (1967).

[2] Chris-Craft's contention that the letters of June 4 and June 20, 1969, sent to all Piper shareholders by W. T. Piper, Jr., Chairman of the Board of Directors and President of Piper, urging acceptance of the Bangor Punta exchange offer, violated Section 14(e) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78n(e), in failing to disclose that the Piper family might obtain additional securities if Bangor Punta was successful in gaining control of Piper, is unsound. This adjustment, provided for in the agreement of May 8th, was designed to compensate the Piper family for having fixed its exchange package more than two months prior to the effective date of the exchange offer and at a lower value than the initial package offered to the public. Simply put, it merely provided protection for the Piper family should the market value of the securities they were to receive be less than the value of the securities offered to other Piper shareholders. Realistically, I cannot say that there is a substantial likelihood that but for this omission in the letters of June 4 and June 20, 1969, a Piper shareholder would have accepted the Chris-Craft exchange offer rather than the Bangor Punta exchange offer. See General Time Corp. v. Talley Indus., Inc., 403 F.2d 159, 162 (2d Cir. 1968), *cert. denied,* 393 U.S. 1026, 89 S.Ct. 631, 21 L.Ed.2d 570 (1969).

A copy of the agreement of May 8th, which contained this provision, was filed with the SEC on May 29, 1969, as

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[4] Affidavit of John S. Buckley, dated August 4, 1969, at 2.

an exhibit to the registration statement. Further, James J. Rochlis and C. Leonard Gordon, officers and directors of Chris-Craft, explained this provision in detail in a letter sent to all Piper shareholders prior to the issuance of Bangor Punta's final prospectus. At the suggestion of the SEC, reference to the possibility that the Piper family's package might be increased in the event Bangor Punta obtained control of Piper was printed on the cover page of Bangor Punta's final prospectus.[5] "Surely stockholders, once informed of the facts, have a right to make their own decisions in matters pertaining to their economic self-interest, whether consonant with or contrary to the advice of others, whether such advice is tendered by management or outsiders or those motivated by self-interest." American Crystal Sugar Co. v. Cuban-American Sugar Co., 276 F.Supp. 45, 50 (S.D.N.Y.1967).

[3] Rule 10b-6, 17 C.F.R. § 240.10b-6, provides that it shall constitute a "manipulative or deceptive device or contrivance" under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), for an underwriter to purchase securities while he is still participating in their distribution.[6] R. A. Holman & Co. v. Securities & Exch. Comm'n, 366 F.2d 446 (2d Cir. 1966), *opinion amended on rehearing,* 377 F.2d 665 (2d Cir.), *cert. denied,* 389 U.S. 991, 88 S.Ct. 473, 19 L.Ed.2d 482 (1967), *rehearing denied,* 389 U.S. 1060, 88 S.Ct. 767, 19 L.Ed.2d 867 (1968). Manipulation was one of the basic evils with which Congress was concerned in enacting statutes to regulate the securities market. See

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[5] Affidavit of John J. Martin, dated August 4, 1969, at 4-5.

[6] "Distribution" comprises "the entire process by which in the course of a public offering the block of securities is dispersed and ultimately comes to rest in the hands of the investing public." Lewisohn Copper Corp., 38 S.E.C. 226, 234 (1958).

Section 2(3) of the Securities Exchange Act of 1934, 15 U.S.C. § 78b(3). Manipulation was often accomplished by those about to sell securities or already engaged in selling them, bidding on the market for the same securities, thereby creating an unjustifiable impression of market activity which would facilitate the sale at artificially high prices. As was noted in Securities & Exch. Comm'n v. Scott Taylor & Co., 183 F.Supp. 904, 907 (S.D.N.Y.1959): "This was one of the practices which the Securities Exchange Act was designed to eradicate, and it is *the* practice which is covered by Rule X-10B-6." (Footnotes omitted.) (Emphasis added.) Weitzen v. Kearns, 271 F.Supp. 616, 623 (S.D.N.Y.1967); Securities & Exch. Comm'n v. Electronics Security Corp., 217 F.Supp. 831, 836 (D.Minn.1963). Bangor Punta's cash purchases of 120,200 shares of Piper in five transactions in May 1969, effected neither on the Exchange nor from or through a broker or dealer, were obviously not designed to place market pressures on the distribution price of Piper, so as to create an artificially high price for this security. Any increase in the price of Piper shares as a result of these transactions would obviously serve only to make Bangor Punta's exchange offer appear less desirable to Piper shareholders.

The SEC has recently proposed Rule 10b-13, which would prohibit a person making a cash tender or exchange offer for any equity security from purchasing such securities otherwise than pursuant to the cash tender or exchange offer. Although the release states that this new Rule is, in effect, a codification of existing interpretations under Rule 10b-6,[7] this Court has been unable to find, and has not been referred to, any support therefor. Moreover, the recent decision in Armour & Co. v. General Host Corp., 296

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[7] Release No. 34—8595, May 5, 1969, CCH § 77,706.

F.Supp. 470, 476 (S.D.N.Y.1969), would appear to the contrary.

> "[S]ubstantial legal issues exist whether Rule 10-b(6) is applicable at all to the instant transactions. The principal question is whether subsection (b) of the Rule applies to the stock of the 'target' corporation [Piper], as well as that of the distributor."

Finally, in considering Chris-Craft's contentions that Bangor Punta and Piper have violated the terms of the final judgment of permanent injunction in making various statements which have been attributed to them by the press, it is well to remember that such episodes may reflect "the difficulties commonly experienced in answering skilled and energetic reporters who seek more definiteness than there is, and the frailties inevitable in human communication * * *." Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 951 (2d Cir. 1969). This, of course, would appear especially true when both Piper and Bangor Punta have expressly denied ever making such statements.[8]

It has been frequently noted that a preliminary injunction is an extraordinary equitable remedy which will be granted only upon a showing by the applicant therefor that it will probably succeed on the trial and that it will suffer irreparable injury if the defendant is not restrained from certain activity pending trial. American Metropolitan Enterprises of N. Y., Inc. v. Warner Bros. Records, 389 F.2d 903 (2d Cir. 1968), and the cases cited therein; Clairol Inc. v. Gillette Co., 389 F.2d 264 (2d Cir. 1968) (preliminary injunction will not be granted except upon a clear showing of probable success).

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[8] Affidavit of Donald L. Deming, dated August 4, 1969, at 16; *supra* note 1 at 14-15.

[4] As previously noted, both the Chris-Craft and Bangor Punta exchange offers have expired. Neither party has gained control of Piper, and both are still in a position to do so. Although a finding by the trial court that plaintiff will ultimately prevail on the merits is not required before issuing a preliminary injunction when, as here, there would appear to be a lack of an adequate showing of irreparable damage, the party seeking a preliminary injunction has the burden of convincing the trial court with reasonable certainty that it will succeed upon the trial. Unicon Management Corp. v. Koppers Co., Inc., 366 F.2d 199, 204-05 (2d Cir. 1966). To show irreparable injury, Chris-Craft must at least demonstrate that "unless an injunction is granted, the plaintiff will suffer harm which cannot be repaired." Studebaker Corp. v. Gittlin, 360 F.2d 692, 698 (2d Cir. 1966). No such showing has been made herein; nor does it appear that the "balance of hardships" tip decidedly toward plaintiff.

[5] "The historic injunctive process was designed to deter, not to punish." Hecht Co. v. Bowles, 321 U.S. 321, 329-30, 64 S.Ct. 587, 592, 88 L.Ed. 754 (1944); Hambros Bank, Ltd. v. Meserole, 287 F.Supp. 69, 72 (S.D.N.Y.1968). The conduct of Bangor Punta must be tested, as the Court of Appeals for the Second Circuit noted in both Electronic Specialty Co. v. International Controls Corp., *supra* at 948 of 409 F.2d, and Symington Wayne Corp. v. Dresser Industries, Inc., 383 F.2d 840, 843 (2d Cir. 1967), by whether " 'any of the stockholders who tendered their shares would probably not have tendered their shares if the alleged violations had not occurred.' " After careful consideration, I cannot say that in the instant suit such would have been the case. The equities of the situation would, therefore, appear to speak against the issuance of a preliminary injunction. Armour & Co. v. General Host Corp., *supra* at 475 of 296 F.Supp.

It is not unlikely that further exchange offers to the remaining public shareholders of Piper may now be contemplated both by Bangor Punta and Chris-Craft. In this respect, then, it is wise to recall, as was noted in Sherman v. Posner, 266 F.Supp. 871, 874 (S.D.N.Y. 1966), that:

> "[N]o matter how clearly it was indicated otherwise, the issuance of the injunction undoubtedly would be viewed by some [of these Piper shareholders] as a favorable adjudication of the claims of the plaintiff. This would be tantamount to a determination of wrongdoing on the part of the * * * [Bangor Punta] management. Just how this result could be remedied in the event it was found at a full hearing that the claims of the plaintiff were unfounded is not readily perceptible to this court."

See Kauder v. United Board & Carton Corp., 199 F.Supp. 420, 424 (S.D.N.Y. 1961); Mack v. Mishkin, 172 F.Supp. 885, 889 (S.D.N.Y. 1959).

Accordingly, and for the foregoing reasons, plaintiff's motion is in all respects denied.

So ordered.

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District Court Opinion
in S.E.C. v. Bangor Punta Corporation

United States District Court

SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, *Plaintiff*, *v.* BANGOR PUNTA CORPORATION, *Defendant.*	70 Civ. 3940(MP)

FINDINGS AND OPINION

APPEARANCES:

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POLLACK, *District Judge.*

POLLACK, *District Judge.*

This is one of a series of cases in this Court arising out of a contest between Bangor Punta Corporation ("Bangor Punta") and Chris-Craft Corporation for control of Piper Aircraft Company ("Piper")—a struggle in which Bangor Punta emerged, in September, 1969, with control of Piper.[1]

Here the Securities and Exchange Commission ("Commission") asks the Court to enjoin Bangor Punta from violating the Securities Act of 1933 and the Securities Exchange Act of 1934 and to order Bangor Punta to make an offer of rescission to holders of Piper stock who exchanged their shares for securities of Bangor Punta, pursuant to an exchange offer of July, 1969.

The Commission charges that Bangor Punta's registration statement and prospectus dated July 18, 1969 pertaining to the Piper exchange offer were materially deficient in omitting to disclose an alleged decision to sell Bangor Punta's 98.7% stock interest in the Bangor and Aroostook Railroad ("BAR") at a price far below its carrying value on Bangor Punta's books and financial statements.[2] The Commission further charges that Bangor Punta intentionally deferred a closing of that sale in order to avoid making and exposing the necessary write-downs until the exchange offer was completed.

Bangor Punta denies that the sale had been decided on in the June to August period that year or that there was

[1] In *Chris-Craft Corporation* v. *Bangor Punta Corporation* (69 Civ. 2227) Chris-Craft sues for damages alleging that Bangor Punta's victory was due to violations of the securities laws. Piper and Bangor Punta have cross-complained. (69 Civ. 2354 and 69 Civ. 2227)

[2] As noted *infra* the sale of BAR stock took place October 2, 1969 and was for $5 million in cash, a figure some $13.5 million below the carrying value of BAR on Bangor Punta's financial statements.

then a reasonable probability of a sale. It contends that it was not required to make any reference in the prospectus of July 18, 1969 to the sale or to any steps leading to sale.[3]

The evidence adduced upon trial established the following facts.

On or about May 29, 1969 Bangor Punta filed with the Commission a registration statement and prospectus for an offering of its securities to holders of Piper common stock in exchange for their shares of Piper. The registration statement became effective on July 18, 1969 and the prospectus was sent thereafter to all Piper shareholders. On this offering, Bangor Punta obtained 111,628 shares of Piper Aircraft or about 7% of the 1,644,790 shares of Piper Aircraft common stock outstanding.

There is no information in the prospectus suggesting consideration or pendency of a sale in June, July or August, 1959. Bangor Punta did sell its stock in BAR to Amoskeag Corporation ("Amoskeag") on October 2, 1969 at a price of $5 million in cash plus certain contingent payments later described.

The historic cost of BAR's assets, less depreciation and other accounting adjustments and less liabilities was about $29.8 million. However, the financial statements in the prospectus carry Bangor Punta's interest at $18.4 million, a figure which reflects an appraised value of the BAR shares as of September, 1965. The history of this figure is as follows:

Until 1961, BAR was an independent company. It then became a subsidiary of The Bangor and Aroostook Corpo-

[3] Bangor Punta has alleged affirmatively that the administrative staff of the Commission, to overcome its own errors and shortcomings, has engaged in a course of conduct, the intended result of which has been to interfere on behalf of and to favor Chris-Craft Corporation in its struggle with Bangor Punta for control of Piper, a struggle which has been going on since May, 1969. No proof was adduced to support this contention.

ration (the "Corporation") which had been formed as a holding company. During 1960 and 1961 the Corporation offered its securities to BAR shareholders in exchange for their BAR shares and acquired more than 98% of BAR's outstanding shares. Based on the market price of BAR shares on the New York Stock Exchange before they were delisted in 1961, the Corporation's interest was worth $8.1 million and the Corporation carried the BAR interest at this figure in its financial statements.

In 1964, the Corporation combined with Bangor Punta (a wholly-owned subsidiary of Punta Alegre Sugar Corporation). Although Bangor Punta could have shown its equity in the net assets of the BAR at $29.8 million, it elected to carry forward the figure appearing on the books of the Corporation, viz., $8.1 million. It is claimed that this was done because of a strong possibility that BAR was to be disposed of promptly. By September, 1965 that possibility had evaporated. But, instead of restating the carrying value of BAR at the amount of Bangor Punta's equity interest in BAR on a historical cost basis (which would have resulted in a carrying figure of $29.8 million) or at its or its predecessor's cost, Bangor Punta obtained an appraisal from investment banking houses with knowledge of the railroad industry. Based on their recommendation as to approximate fair market value Bangor Punta restated the BAR holding at $18.4 million—approximately $10 million less than its equity in the underlying net asset value of the railroad on an historical cost basis and $10 million more than the former carrying figure. The difference between the former carrying figure of $8.1 million and the new appraised value of $18.4 million was credited directly to Bangor Punta's earned surplus, by-passing the profit and loss account. This treatment had been the subject of inquiry

by the Commission in connection with a prior registration statement and, after explanations were made, the Commission dropped the matter.

Except for minor accounting adjustments the $18.4 million carrying value of BAR established in 1965 remained unchanged and was reflected in the 1969 registration.

Bangor Punta's management had, for some time, sought a means of separating out BAR in a way which would permit its continued operation as a railroad. Discussions to that end were held within Bangor Punta in 1967 and 1968 and continued into 1969. Several methods were speculated on: viz., the creation of a New England Railroad System by combining the BAR with the Maine Central and Boston and Maine Railroads; an acquisition of the Delaware and Hudson Corporation to combine its railroad with the BAR; a spin off of BAR or a rights offering to the Bangor Punta stockholders. Prior to April of 1969 there seemed to be no prospect of a buyer for the railroad.

On April 1, 1969 Bangor Punta appointed a committee to study the possible divestiture of BAR. The committee consisted of Curtis M. Hutchins, a director and member of the Executive Committee, Gordon Robertson, co-Chairman of the Board and Chairman of the Executive Committee, Robert G. Stone and George H. Siel, Directors of the railroad. Messrs. Hutchins and Robertson were both past presidents of the railroad. This was a highly knowledgeable group on matters pertaining to the railroad and its problems.

Some weeks after the Committee was appointed Amoskeag Company through its president, Frederic C. Dumaine, made an offer to C. M. Hutchins for the railroad of $5 million in cash. Dumaine had long and active experience in the railroad business as an operator. Amoskeag was a

registered investment company with investments in the Maine Central Railroad Company among other enterprises. Dumaine's price was merely the amount of the savings in operating expenses which he estimated could be effected if the Maine Central and BAR were combined.

Hutchins told Dumaine—in response to his query—that Bangor Punta might dispose of its interest in the railroad if the price was right. To Dumaine's offer of $5 million—for either the assets or the stock[4]—Hutchins responded that this was exceedingly low but that he would convey it to the management. Essential details—including the railroad's cash flow figures, its balance sheet and a five year forecast, both cash and profit and loss—were furnished to Dumaine at a second meeting with Hutchins. Dumaine reaffirmed his $5 million offer as his highest price. Hutchins explained that he had no authority except to explore possibilities of divestiture of the railroad; he had no power of decision.

Hutchins and the Committee members with whom he conferred concluded that sale of BAR stock to Amoskeag at the proferred price of $5 million was the "best course for Bangor Punta to pursue."

The company's independent auditors were asked about the accounting treatment which would be afforded a sale of the railroad for $5 million. On May 20, 1969 they reported that such a sale would be treated on the financial statements of Bangor Punta as an extraordinary loss of about $13.5 million.

On May 21, 1969 at a meeting of Bangor Punta's Board of Directors, Hutchins, speaking for all the members of his Committee, stated that there were three possibilities for the

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[4] Dumaine's offer soon narrowed to one for the stock only and remained such through the negotiations.

future of BAR. Bangor Punta might (1) keep the railroad as is, (2) continue to seek to merge it with another railroad, or (3) sell BAR at the best possible price. He discussed each of these possibilities. In respect of the third possibility, he stated that the only person he knew who might be interested in a purchase was Dumaine, of Amoskeag. He reported that preliminary discussions with Dumaine indicated that he might be willing to pay $5 million in cash, securities or some combination of both.

Hutchins told the Board that his Committee unanimously recommended sale at the $5 million price. He reported that over the next five years a heavy infusion of capital in the order of $5 million would be needed to break even from operations. He gave very little hope for the possibility of a merger except conceivably with the Boston and Maine Railroad, and noted that this would produce securities rather than cash for Bangor Punta. This proposal of sale was a surprise to the Board and met with the objection that the Board had insufficient information to make an intelligent decision since a great deal of accounting, tax and legal work had to be done as a preliminary matter to put the offer in proper focus.

In the course of the meeting, counter-suggestions as to price to be sought were broached by the Chairman of the Board, Nicholas M. Salgo.

Following discussion, it was the consensus of the Board that Hutchins should attempt to negotiate for a sale, at book value, of 51% of the stock of BAR and sale of the balance at a higher price with a total consideration to approximate $7 million. Hutchins was separately authorized to negotiate a sale of 100% of the BAR stock, subject to an investigation of the tax and accounting ramifications of such a transaction and subject to the approval of the

Board of Directors or of the Executive Committee of the Board of Directors.

Dumaine, informed by Hutchins of the Board's counter-suggestions, would not change his offer. Dumaine and Hutchins then drafted an unsigned letter setting forth a proposed arrangement of sale which Hutchins was to present to the Board. The draft, reciting that Hutchins was authorized only to explore the situation tentatively and that any "understanding" was subject to approval by the Board of Directors,[5] stated that Hutchins and Dumaine had agreed on the sale to Amoskeag of all the BAR stock owned by Bangor Punta for $5 million plus some additions, subject to ICC approval.

Shortly thereafter, on June 3, 1969, following Hutchins' report to a key management group of Bangor Punta, it was decided to table the entire matter until the tax impact upon Bangor Punta of a sale of assets, as compared with some other disposition of the interest, could be studied and ascertained.[6] Nothing indicated that there was any especial urgency to give the matter earlier consideration. While the divestiture of this asset was a matter of significant interest to Bangor Punta, time was not made of the essence, by either Bangor Punta or Amoskeag.

Two weeks later, on June 16th, Hutchins met with Dumaine and apprised him of the management's decision

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[5] Hutchins explicitly informed Dumaine that time was needed for accountants and tax personnel of Bangor Punta to *review the tax effects of any deal and the evidence unquestionably confirms Hutchins' limited exploratory role.*

[6] The study would require considerable time since it involved going to the Interstate Commerce Commission, sending representatives to Maine and going back over some 70 years of financial history and records and books of the BAR—a time consuming and complex project.

not to approve or accept the unsigned draft letter. He told him that Bangor Punta lawyers and accountants had no time available then to make the investigations and reports deemed essential by the Board; that they were busy with a variety of other matters, including a pending SEC registration statement (the Piper exchange offer); and that it might be two months before they could get to the investigation of the factors material to Bangor Punta's consideration of a sale.

Bangor Punta's general exchange offer for the common stock of Piper Aircraft expired at 5 P.M. on July 29, 1969 and was approved by Bangor Punta's shareholders on August 7, 1969. On August 8, 1969, Bangor Punta commenced distributing its securities to Piper shareholders who had accepted the exchange offer. The final prospectus for the offer stated:

> Until August 27, 1969, all dealers effecting transactions in the registered securities, whether or not participating in this distribution, may be required to deliver a Prospectus.

In the latter part of August, 1969, with the exchange program well nigh completed, Hutchins approached the general counsel of Bangor Punta with the suggestion that the required studies in respect to a sale of BAR go forward. Following instructions from the president, counsel began to gather the information which the Board of Directors was seeking.[7]

On September 9, 1969, Bangor Punta's Board of Directors continued their discussions regarding the sale of BAR, which according to the minutes "has been under

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[7] The president was, however, careful to caution counsel not to allow the inquiry to interfere with any pressing current matters.

the consideration by the Board of Directors for a considerable period of time". Various proposals concerning the sale of the railroad were discussed, including an asset sale, a combination of a partial sale of the assets and a leasing arrangement of the remaining assets, and the sale of the stock of the railroad.

The Directors voted at that meeting to authorize Hutchins to consummate the sale of either the assets or stock of BAR to Amoskeag or to any other buyer for a consideration of $5 million or more in cash and such other additional consideration and benefits as were in his judgment obtainable and the Board authorized the execution of documents and the taking of all other action necessary to consummate a sale in accordance with the terms and conditions so to be negotiated.

Six days later, on September 15, Hutchins wrote to Dumaine that Bangor Punta had not yet reached a decision as to whether it would be most advantageous to dispose of its interest in the BAR through a sale of the stock ownership or in the form of an assets sale. Hutchins proposed to Dumaine that an agreement be worked out which would allow Bangor Punta, at its option, to sell either the BAR stock or assets.

On October 2, Hutchins and Robertson met with Dumaine in Boston. Dumaine refused to change his position in respect of an assets transaction. Thereupon, a contract for the sale of the stock of BAR to Amoskeag was prepared and signed and the closing followed immediately thereafter.

The agreement of sale called for payment of $5 million in cash and other consideration. It was agreed that, if within three years BAR should transfer all of its assets except in a transaction in which neither gain nor loss is recognized for federal income taxes, Amoskeag would pay

Bangor Punta an additional $1.5 million within 30 days after such transfer sale or other disposition.[8] And, subject to specified conditions, Amoskeag agreed that it would also pay the net profits received by BAR within the next five years from sale of all or any part of its property at Sears Island, Maine.

The public announcement of the BAR sale on October 3, 1969 expressly stated that it would result in a non-recurring book loss of approximately $13 million with no tax benefit to the company and that part of the $5 million to be received in cash for the stock would be subject to capital gains taxes.

Major Factual Contentions and Conclusions

It is contended by the Commission—and Dumaine gave testimony supporting the notion—that, at some undefined time during June, July or August, Bangor Punta had decided upon the sale to Amoskeag but decided to defer it to avoid disclosure in the pending registration statement and prospectus. These contentions, as well as Dumaine's testimony on the subject, lack support both in the credible evidence and in the probabilities. Indeed the evidence which the Court accepts as worthy of belief unequivocally negates any such purpose or plan.

The Commission's reliance on Dumaine's testimony is misplaced and the inferences which it has sought to draw that a sale was determined upon and deliberately deferred to avoid disclosure, are not accepted.[9]

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[8] The purpose of this provision is not entirely clear. It may have been intended to act as a deterrent to Amoskeag to consider any course but continuance of operation of the road.

[9] From observation during the trial the Court concludes that both Dumaine and Hutchins who negotiated and desired the sale, believed what they wished to believe, that their personal agreement concluded all but the formalities.

The Bangor Punta Board's behavior was consistent with the dictates of prudence. It insisted on consideration and study of alternatives. It accepted the sale only after being convinced that no viable alternatives existed. If there was a conscious tactical motive in delay, the most believable one is that the Board hoped to let Dumaine (and indeed Hutchins, whose personal commitment to the sale was obvious) simmer long enough to come up with something better. Indeed, even after the Board meeting of September 9, information was being supplied to the Board and, on September 29, some of the Board members attempted to block a sale of stock and bring about a sale of assets. Their reasons were weighty—for a sale of assets might permit the reflection of a tax loss as high as $17.7 million, with some $9 million of cash flow addition for Bangor Punta—as distinguished for the taxability of proceeds from sale of stock.

Thus, while the Court finds that there was an intention to sell, failing other alternatives and upon the best available tax and accounting bases, the Court does not find that Bangor Punta consciously concealed, deferred or refrained from going forward with Dumaine's offer in order to circumvent disclosure in a pending registration statement.

Requirements of Disclosure

Bangor Punta could not in its registration statement and prospectus for the exchange offer omit "to state [any] material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a); Section 10(b) of the Securities Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 CFR 240.10b-5.

Bangor Punta's registration statement became effective on July 18, 1969. It "spoke" as of that date. The duty of

dealers to use prospectuses continued until August 27, 1969.[10] The Commission insists that as of these dates Bangor Punta intended to sell and there was a reasonable probability that it would sell BAR at a substantial loss. Its failure to reflect this state of affairs is claimed to constitute the violations charged.

The Court has found that as of these dates Bangor Punta had not reached a decision to sell. The Commission's charge that the sale was a reasonable probability is made from the vantage point of hindsight. In the total perspective of events preceding the sale—including the last-minute attempts to convert it into a sale of assets—the Court cannot find that the sale was a reasonable probability at the time and to the people involved. *Cf. James Blackstone Mem. Library Assn.* v. *Gulf, Mobile and Ohio R. Co.*, 264 F.2d 445 (7th Cir.), *cert. denied*, 361 U.S. 815 (1959). However, this does not necessarily mean that Bangor Punta met the obligation imposed upon it to make a requisite disclosure under the circumstances of this case. For the circumstances do indicate a sufficiently serious consideration of the possibility of sale at a figure some $13 million below the then carrying value of the BAR stock on Bangor Punta's books so as to force the conclusion that the Bangor Punta directors could not, at the time, have believed that the $18.4 million figure (based on an appraisal of 1965 fair market value) any longer represented a responsible appraisal of market value of the BAR holding.

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[10] The antifraud provisions of the Securities Act (§ 17(a)) and of the Exchange Act (§ 10(b) and Rule 10b-5) require the prospectus to reflect any post-effective changes necessary to keep the prospectus from being misleading in any material respect. This is sometimes handled mechanically by putting a sticker on the prospectus or supplementing it otherwise. The procedure to be used is set forth in 17 CFR 230.424(c).

In this respect, however, the Commission is claiming more than it needs to. The essential question is whether, despite the non-existence of intent or of reasonable probability, the circumstances surrounding the sale were such as to indicate that the $18.4 million carrying figure of the BAR holding was obsolete to the point of being misleading. The Court finds that it was—absent full disclosure of the factors affecting the ultimate decision to sell the BAR interest at a figure of $5 million—or even $7 million—and regardless of whether the sale was to be of stock or of assets.

The Court is aware of no principle of accounting or of fair disclosure which would justify a failure to up-date a constructed carrying figure which may have reflected approximate fair value in 1965 but which was almost four times the offer of a willing buyer (and the only willing buyer) in 1969—an offer which the Board, despite its efforts in good faith to find alternatives—was constrained ultimately to accept. Consistency of fair disclosure required exposure of circumstances which so clearly rendered obsolete an appraisal made four years earlier.

I find that Bangor Punta did not intentionally or purposefully mislead Piper Aircraft stockholders or the public or investors by the omission to make disclosure of the sale under consideration nor did Bangor Punta or its directors intend to gain an advantage over Chris-Craft by the nondisclosure in the contest being waged for control of Piper. There was no purposeful connection between the nondisclosure and the contest for control. In other words, the nondisclosure was not prompted by an improper purpose. However, absence of bad faith does not excuse the failure to state facts necessary to make the facts stated not misleading.

The explanatory footnote which did appear on the 1969 balance sheet was given so that anybody looking at the

financial statements would not be confused as to why the full equity of the railroad was not picked up by Bangor Punta as the carrying value of its investment. By the same token, the 1965 constructed carrying value should not have been used when it was known to substantially exceed the only bid that could be generated from a purchaser capable and willing to buy and operate the asset.

Bearing on Exchanging Piper Holder

The standard of materiality to be applied here is whether a reasonable stockholder of Piper might have hesitated to make an exchange for Bangor Punta securities with such a large loss figure emerging—at least until sufficiently explained and put in proper perspective, in terms understandable by a reasonable investor.

At the end of fiscal 1968, Bangor Punta had retained earnings of $37.9 million. A sale of the stock at $5 million would result in a book loss equivalent to 36.5% of such retained earnings.

At the end of fiscal 1968, the shareholders' book equity in Bangor Punta was $113.5 million and a sale of the BAR at $5 million would result in a loss of 12% of the shareholders' book equity.

Bangor Punta had reported profits for each of the five years ending with that for September 30, 1968. A sale such as was being investigated would involve the loss ($4.32 per share) which would have far exceeded the company's net income for any of the five prior years.

The Court concludes that the registration statement and prospectus of Bangor Punta relating to the Piper exchange offer was misleading in its failure to disclose the circumstances surrounding the negotiations for sale of the BAR interest. In so holding especial note is taken of the

unique "valuation" nature of the $18.4 million figure at which the BAR interest was carried on Bangor Punta's books. The present conclusion is not necessarily to be taken as applicable in cases where book carrying figures are in accordance with principles of conventional transactional accounting or where circumstances might otherwise be different.

Relief to be Granted

The Commission has requested an order requiring Bangor Punta to offer rescission to shareholders who accepted the Bangor Punta exchange offer and an order enjoining Bangor Punta from further violations of the securities laws. The Court grants the first and denies the second of these requests.

Bangor Punta claims that such an offer of rescission would be an empty exercise since the Bangor Punta securities received by the Piper shareholders have a market value far in excess of the Piper shares given up by them. See *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 947 (2d Cir. 1969). The decision whether to rescind is nonetheless one to be made by those who took the exchange.

Accordingly, Bangor Punta will be required to make an offer of rescission and the parties are directed to submit an appropriate decree for the Court's consideration to carry out such an offer. Such offer should allow Bangor Punta full scope to point out any factual considerations bearing on a decision to accept or by-pass rescission as may be accurate and appropriate under the circumstances.

Bangor Punta claims that an injunction is unnecessary and inappropriate since there is no evidence of its bad faith; that it acted on advice of counsel and of its accountants; and that this was an isolated transaction involving a single unintentional violation. *Securities and Exchange Commission* v. *Torr*, 87 F.2d 446 (2d Cir. 1937). Moreover, Bangor Punta contends that its past conduct does not indicate a reasonable likelihood of future violations. *Securities and Exchange Commission* v. *Franklin Atlas Corp.*, 171 F. Supp. 711 (S.D.N.Y. 1959) (Dawson, J.); *Securities and Exchange Commission* v. *Texas Gulf Sulphur Co.*,_____ F.2d _____ (2d Cir. June 10, 1971).

The Commission insists that Bangor Punta has demonstrated a propensity for violating the securities law because the company allegedly violated a consent decree entered on May 26, 1969 by the United States District Court for the District of Columbia in the Commission's suit there against Bangor Punta, by filing a registration statement which omitted to disclose the facts discussed in this opinion. That suit centered on a Bangor-Punta-Piper release of May 8, 1969. Bangor Punta consented to the decree and the Commission's complaint here avers that the company's demonstrated propensity for violating the securities laws is not at all based upon the issuance of that release (which is a subject of controversy in an action by Chris-Craft against Bangor Punta and others). *Chris-Craft Industries, Inc.* v. *Bangor Punta Corp.*, 426 F.2d 569, 573-576 (2d Cir. 1970) and *ibid* 69 Civ. 2354 now before this Court for decision.

Under all the facts and circumstances in this case, the Commission has failed to carry its burden to establish, with persuasive evidence, that Bangor Punta, its officers, directors and employees have a propensity or natural inclination to violate the securities law. *Securities and Exchange Commission* v. *Texas Gulf Sulphur Co.*, _____ F.2d ____ (2d Cir. June 10, 1971). Accordingly, the requested injunction is denied.

D-18

District Court Opinion
in S.E.C. v. Bangor Punta Corporation

The foregoing shall constitute the findings and conclusions required by F. R. Civ. P. 52(a).

Submit decree in accordance with these findings on 15 days notice.

So Ordered.

Milton Pollack
U.S. District Judge

August 25, 1971

D-19

District Court Memorandum on Settlement of Judgment
in S.E.C. v. Bangor Punta Corporation

United States District Court

Southern District of New York

Securities and Exchange Commission, *Plaintiff*, *v.* Bangor Punta Corporation, *Defendant.*	70 Civ. 3940(MP)

MEMORANDUM

Pollack, *District Judge.*

Bangor Punta requested the Court to reopen the record and to make additional findings of fact. Subsequent to receiving SEC's opposition to the request, Bangor Punta withdrew the application to reopen the record as unnecessary and has substituted a request that the Court issue a statement in disposing of this matter that generally accepted accounting principles were not litigated herein. The request and opposing paper are being filed herewith.

It is beyond the scope and intent of the opinion of August 25, 1971 to consider or decide what constitute accepted principles of accounting in the abstract. The opinion deals solely with the requirements of a prospectus used on an exchange of securities and what is to be considered misleading in connection therewith. Any differences between accepted principles of accounting and fair disclosure in a prospectus must be resolved in favor of the disclosure requirements of a prospectus which essentially are a management not an accountant's responsibility.

The application to reopen the record and for additional findings is accordingly denied.

So Ordered.

(original signed)
Milton Pollack

U. S. District Judge

September 17, 1971

United States District Court

SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
v.
BANGOR PUNTA CORPORATION,
Defendant.

70 CIV. 3940 (MP)

MEMORANDUM ON SETTLEMENT OF JUDGMENT

POLLACK, *District Judge.*

A provision has been inserted in the decree submitted for settlement requiring that any rescinding holder should account on the offer of rescission for any profits realized from interim sale of all or any part of the original stock obtained on the exchange in August, 1969.

The purpose of restitution is to put the injured party in as good (not a superior) position as that occupied by him before the contract or sale or exchange was made. If a rescinding party has made profitable use of the subject of the rescission, or has received fruits such as dividends or interest or other benefits thereon, these profits, fruits, other benefits and their values must be accounted for by the rescinding party to effect a return to the *status quo ante*. A party will not be permitted to retain the benefits or fruits of a contract and at the same time repudiate it. It is inappropriate for a rescinding party to in effect affirm his ownership in part and to disaffirm the entire transaction.

> It is a prerequisite to restitution that a party disgorge to the other party any proceeds the former has received

> upon disposition of the original property. *Marr* v. *Tumulty*, 256 N.Y. 15, 175 N.E. 356 (1931).
>
> *Mott* v. *Tri-Continental Financial Corp.*, 330 F.2d 468, 470 (2d Cir. 1964).

Ordinarily, if one no longer owns the original shares acquired in a rescindable transaction, he is limited to an action for damages and may not be accorded rescission. *Mott* v. *Tri-Continental Financial Corp., cit. supra,* at 470. Equity may waive this requirement in a proper case and may permit the rescinding party to account to the other party for the value of any part sold. Williston, *Contracts*, § 1463, p. 161 (3rd ed., Vol. 12, 1970). Equity may also permit the restitution to consist of substitute shares acquired for the purpose of rescission. In that event, everything of value including the profit, if any, realized from a prior sale or disposition of the original stock and the subsequent reacquisition of like shares must be accounted for to the other party as a prerequisite to rescission, in the same way as other fruits of the interim ownership must be restored. See, Corbin on *Contracts* §§ 1114-1115, Volume 5 (1964 Ed.); 17 Am. Juris. 2d § 512, p. 996 (2d Ed. 1964); *Marr* v. *Tumulty*, 256 N.Y. 15, 175 N.E. 356 (1931); *Ufland & Co.* v. *McMahon*, 215 App. Div. 267, 269 (4th Dept. 1926); *Commissioner of Banks* v. *Chase Securities Corp.*, 298 Mass. 285, N.E. 2d 472, 499, 500 (1937); *E.T.C. Corp.* v. *Title Guar. & Trust Co.*, 271 N.Y. 124, 2 N.E. 2d 284 (1936).

November 17, 1971

MILTON POLLACK
U. S. District Judge.

D-22

District Court Opinion in Bangor Punta Corporation v. *Chris-Craft Industries, Inc.*

United States District Court

SOUTHERN DISTRICT OF NEW YORK

BANGOR PUNTA CORPORATION,
Plaintiff,
v.
CHRIS-CRAFT INDUSTRIES, INC., *et al,*
Defendant.
} 69 CIV. 2354 (MP)

OPINION

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POLLACK, *District Judge.*

D-23

District Court Opinion in Bangor Punta Corporation v. *Chris-Craft Industries, Inc.*

POLLACK, *District Judge.*

This cross action by Bangor Punta, a defendant in *Chris-Craft* v. *Bangor Punta et al* (S.D.N.Y. 69 Civ. 2227) decided this day, arises out of the bitter struggle between the two companies for control of Piper Aircraft Corporation. That struggle ended in the marketplace with Bangor Punta in control and continues in the complaints and cross complaints by the parties against each other arising out of their competition.[1]

The principal facts are set out in this Court's opinion in S.D.N.Y. 69 Civ. 2227. They will be deemed incorporated and need not be repeated at length here.

Chris-Craft sued for damages as the losing contender for control of Piper by reason of Bangor Punta's alleged wrongful acts. Bangor Punta countered by charging, in essence, that because of the wrongful acts of Chris-Craft it paid more than it would otherwise have paid to acquire control of Piper. Both suits were tried together.

Bangor Punta adduced no proof specifically in its case as plaintiff. It seeks support for its contentions in the record developed in *Chris-Craft* v. *Bangor Punta, et al.* (S.D.N.Y. 69 Civ. 2227).

This complaint, like that in the companion case, is replete with charges of breach of the requirements of securities laws and rules. Like the other, it has been brought and tried as though any such breach by a competitor automatically creates windfalls for a sophisticated and well-financed contender for corporate control. It must be remembered that this is an action by the willing and winning contender which bought Piper stock with its eyes open, presumably paying what it deemed control of Piper to be

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[1] Piper, the target company, asserted a counter claim against Chris-Craft in S.D.N.Y. 69 Civ. 2227.

worth. The Court has here been especially challenged to maintain its footing in the realities and the equities in searching (in vain) for credible evidence establishing causal connections between alleged violations and actionable damage.

The Contentions

(a) Bangor Punta insists that the plan of Chris-Craft to acquire control of Piper existed before the time when, according to Chris-Craft, the plan was formulated and that Chris-Craft concealed its true purpose from a registration statement filed with SEC to raise capital for the purchase and from prospectuses legally required to be used during a period when its unrevealed plan to obtain control of Piper was in existence.

We comment here on this contention because it is typical of others in the case. Even if it rested on more than mere surmise, it raises no issue proper to a plaintiff in Bangor Punta's posture. Bangor Punta was not a purchaser of securities issued under the statement of which it complains. There are possible links of relevance between the alleged deficiency in the registration statement and Bangor Punta's campaign. But they are not links to liability of Chris-Craft to Bangor Punta. Thus:

(1) If the registration statement were materially misleading there might be room to argue that Chris-Craft obtained by illegal means the money used to compete with Bangor Punta. There might then be examined the rights of those from whom the money was so obtained. But the Court sees no basis for awarding damages to Bangor Punta because Chris-Craft failed to disclose to its sources of funds its intended use of those funds.

(2) If Chris-Craft did intend to use the proceeds of this registered issue to obtain control of Piper, a disclosure of

that fact would have given Piper (and/or Bangor Punta) an earlier opportunity than they had in fact to prepare a counter-campaign. However, Chris-Craft owed no duty to Piper or Bangor Punta to announce its intentions for their benefit. Its disclosure obligations (assuming they existed as alleged) in the prospectus complained of or in 13-D reports, were for the benefit of investors with whom Chris-Craft would be dealing in its campaign for control.[1A] Bangor Punta does complain of failure to make—and of inadequate —13-D statements. Thus:

(i) It asks us to find that Chris-Craft and the broker it used to buy Piper stock constituted a "group" or "syndicate" whose intentions should have been reported.

(ii) It contends that 13-D statements made by Chris-Craft should have disclosed that (as alleged by Bangor Punta) cash used in Chris-Craft's tender offer was borrowed and that such use of the cash would constitute a default under certain of Chris-Craft's arrangements with its creditors.

The first of these contentions is not only far-fetched, but is wholly out of Bangor Punta's reach as a weapon against Chris-Craft. The latter contention would be a dubious one even if made by a Piper stockholder to whom the statement is specifically addressed. For that stockholder either tenders and walks off with cash or remains a Piper holder having no concern with Chris-Craft's relations with its creditors.[2]

[1A] See, *GAF Corporation* v. *Milstein*, 324 F.Supp. 1062 at 1070 (S.D.N.Y. 1971) (Pollack, J.) "the Williams Bill concentrated on an investor protection goal rather than on providing protection for management's ability to repel raiders."

[2] The situation is not the same, of course, in a registration statement covering an offer of exchange. There the accepting holder of target company stock is destined to become an investor in the offering company—with a strong interest in that company's relations with its creditors.

(b) Bangor Punta alleges that Chris-Craft opened a "secret" "numbered" account at a brokerage firm which assisted it in locating and acquiring large institutionally held blocks of Piper. At least one institution (Technology Fund) it is claimed, to which Chris-Craft paid $65 per share for more than 100,000 shares of Piper—at a time when the market was in the low fifties—simultaneously made a large purchase of Chris-Craft stock in the open market. The alleged purpose of this allegedly prearranged move was to "stabilize or manipulate" the price of Chris-Craft common. Chris-Craft planned to include in its acquisition program an offer of exchange of Chris-Craft for Piper securities. Obviously, a high price for Chris-Craft common would greatly facilitate such an exchange.

(c) Several other institutions (one of which had tendered Piper stock to Chris-Craft for cash during the pendency of a Chris-Craft tender offer) also bought large amounts of Chris-Craft on the open market. In the month shortly before Chris-Craft filed its registration statement to cover its proposed exchange offer, these institutions purchased some 231,800 Chris-Craft shares (more than 17%) of the number outstanding. These purchases caused the daily average of trading on the New York Stock Exchange to increase from 7,500 shares to 23,400 shares. The price of Chris-Craft common, during this month, rose to 45% above the average of its closing prices for the six weeks preceding these purchases.

By mid-1970, with the serious market decline notably in prices of stocks of conglomerates, the institutions were taking heavy losses. Their liquidations of position, Bangor Punta claims, were designed to do the least damage to the price of Chris-Craft and hence to the progress of Chris-Craft's exchange offer program.

(d) While its cash tender offer for Piper stock was open Chris-Craft was also buying Piper stock in the open market. This was a violation of S.E.C.'s Rule 10b-6 and the Commission, upon becoming aware of what was happening, ordered Chris-Craft to cease these purchases. Thereupon at least one institution (which had previously sold a large block of Piper to Chris-Craft) purchased Piper stock in the open market and tendered the shares to Chris-Craft. Bangor Punta claims the transaction to be a device to have done by others what Chris-Craft could not do itself.

Bangor Punta bottoms its case on Rule 10b-5 under the Securities Exchange Act,[3] claiming that Chris-Craft's "integrated" bid for control of Piper was in its entirety a "manipulative and deceptive contrivance" whose total effect was to inflate the price of Piper stock and so to damage Bangor Punta as a purchaser of that stock It cites *Eagle* v. *Horvath*, 241 F. Supp. 341, 344 (S.D.N.Y. 1965) for the proposition that while a thoroughly legal campaign by Chris-Craft for control of Piper might also have raised the price of Piper stock, it must make restitution for having done the same thing by illegal means.[4] It cites other cases

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[3] 17 C.F.R. § 240.10b-5 (1971)

[4] *Horvath* and apposite cases, if at all applicable here, are in an important sense contrary to Bangor Punta's position. Bangor Punta asks us to regard the entire Chris-Craft program as fatally tainted because of alleged violation spots in the program. It does not bear the burden of showing the causal relation between the violations themselves and its damage. Yet, the holding in *Horvath* is precisely that such a relation is a vital issue. In *Horvath* a motion for summary judgment in a stockholders' suit was denied because there was, at issue, the question whether an alleged false prospectus in fact motivated stockholder votes on the plan being attacked in the case.

We did not, at Chris-Craft's instance, spread the taint of single alleged violations by Bangor Punta over all of Bangor Punta's campaign. We see no warrant for a contrary treatment of Bangor Punta's contentions here.

for the propositions that privity between buyer and seller is not an essential condition for application of Rule 10b-5, *Fischman* v. *Raytheon,* 188 F.2d 783, 786 (2d Cir. 1951)[5] and that manipulative activities unrelated to the plaintiff and not designed to induce the plaintiff to buy or sell are, nonetheless, actionable. *Cochran* v. *Channing Corp.,* 211 F. Supp. 239 (S.D.N.Y. 1962);[6] *Sarlie* v. *E. L. Bruce Co.,* 265 F. Supp. 371 (S.D.N.Y. 1967).[7] Characterizing itself as a buyer of Piper "deceived" by the manipulative activity of Chris-Craft, Bangor Punta also invokes *Crane Co.* v. *Westinghouse Air Brake Co.,* 419 F.2d 787 (2d Cir. 1969)[8], *cert. denied,* 400 U.S. 822 (1970).

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[5] In *Fischman,* the court (Frank, C. J.) pointed out the difference in proof required to sustain a Section 11 suit under the Act of 1933 and a Section 10-b suit under the Act of 1934. In the former the plaintiff's burden is to show an acquisition of the direct subject of a registration statement while in the latter, any deceived purchaser relying on a *fraud* may sue.

[6] *Cochran* v. *Channing* was a suit by a holder of Agricultural Insurance Company stock who sold at depressed prices and alleged that Channing Corporation, the defendant, dominated the Company, formed an undisclosed plan to secure control of it by offering an exchange of stock of another company for Agricultural and by purchasing Agricultural stock at depressed prices caused by lowering Agricultural's dividend and other similar practices. Judge Dawson of this District held the complaint good under Rule 10b-5 against a motion to dismiss for lack of privity. The case cannot support the contentions of a plaintiff in Bangor Punta's posture. It cannot claim itself a beneficiary of any fiduciary obligation of Chris-Craft such as was deemed by Judge Dawson to be owed by Channing to the plaintiff.

[7] *Sarlie* v. *Bruce* seems wholly inapposite. It involved a default dismissal of plaintiff's action and concerned itself largely with the measure of damages in a counterclaim by a company (Bruce) whose president (Gilbert) allegedly used misappropriated funds in an attempt to capture control of Celotex Corporation.

[8] *Crane* v. *Westinghouse,* is beside the mark. There, the alleged market manipulation was effected for the express purpose of preventing

Other aspects of Chris-Craft's program are complained of—quite apart from their place in an overall scheme alleged to be unlawful.

1. The allegedly induced purchases of Chris-Craft common by institutions preceding the Chris-Craft exchange offer are alleged to be manipulations in violation of Section 9(a)(2) of the Exchange Act[9] which inflated the price of Piper common, as well as that of Chris-Craft. *Crane, supra,* is cited as authority for Chris-Craft's liability.

2. Bangor Punta has reached into the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.,* in its search for deficiencies in Chris-Craft's program and purports to have found one in Section 17(a), 15 U.S.C. § 80a-17(a) (1971) of that Act. The Section (together with relevant Section 2(a)(3), 15 U.S.C. § 80a-2(a)(3)) provides that without an express order of S.E.C.

> SEC. 17(a) It shall be unlawful for any affiliated person or promotor of or principal underwriter for a registered investment company (other than a company of the character described in Section 12(d) (3)(A) and

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a competitor for control from succeeding in its bid and the facts pleaded showed a distinct causal nexus between the manipulation and its actual and intended result. To suggest that Chris-Craft, itself an avid buyer of Piper, "manipulated" the price of Piper upward and to characterize Bangor Punta as a buyer "deceived" by this manipulation strains even credulity.

[9] Section 9(a)(2), 15 U.S.C. § 78i(a)(2)(1971), reads:

> "It shall be unlawful for any person, . . . to effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others."

(B)), or any affiliated person of such a person, promoter, or principal underwriter, acting as principal ...

(2) knowingly to purchase from such registered company, or from any company controlled by such registered company, any security or other property (except securities of which the seller is the issuer) ...

SEC. 2(a)(3) "Affiliated person" of another person means (A) any person directly or indirectly owning, controlling, or holding with power to vote 5 per centum or more of the outstanding voting securities of such other person; (B) any person 5 per centum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; ...

Since, at the time Chris-Craft made its purchase from Technology Fund, *supra,* both it and the Fund owned more than 5% of Piper, Chris-Craft was an affiliate of an affiliate of an investment company and prohibited from making the purchase without prior order of SEC. No such order was ever requested.

The Merits of the Contentions

Chris-Craft's response to Bangor Punta's charges is to label Bangor Punta's case as "sheer fantasy" and its inferences as "Kafkaesque logic". Chris-Craft's attacks on the evidentiary underpinning and legal support of Bangor Punta's case would require a minute consideration of the record and of precedents cited were this Court to accord to Bangor Punta the status of damaged innocent which it claims for itself.

But Bangor Punta cannot wear that mantle. It was the willing and winning contestant in a hard fought and (for both sides) enormously expensive struggle for control.

This Court will readily agree that Bangor Punta paid more to acquire control of Piper than it would have if Chris-Craft had not, by the time Bangor Punta entered the contest, already been well on its way in acquiring Piper stock. Indeed the possibilities are that, if Chris-Craft had not already shown itself to be so powerful a bidder for control, Bangor Punta's cost would have been zero. For the record is ineluctably convincing that Bangor Punta came in at Piper's urging and specifically to resist Chris-Craft.

In dealing with *Chris-Craft* v. *Bangor Punta et al., supra,* this Court made it clear that it would not, at the behest of a disappointed contender in a battle for corporate control, necessarily take the same view of the requirements of the securities laws and rules as it does in cases of claimed injury to the average public investor. These considerations apply with even greater vigor to actions by the winner complaining that he was forced to overpay.

Bangor Punta's claim of "integrated" and "concerted" efforts by "coparticipants" has no more weight than similar language aimed by Chris-Craft, as plaintiff, against Bangor Punta as defendant. Chris-Craft has amply disposed of several of Bangor Punta's factual contentions (as e.g., its charge that an originally submitted and then deleted portion of Chris-Craft's registration statement to cover its debenture issue in December 1968 "evidenced" an undisclosed intention to acquire Piper with the proceeds). But even taking on their face each of Bangor Punta's charges of violations leaves us asking why Bangor Punta should be made a money beneficiary. The price it paid for Piper it paid with open eyes. The rapport between it and the Piper management should have given it more easy access to information about Piper than was available to Chris-Craft—even with two Chris-Craft representatives on the

Piper board. Its inducement to pay the prices it did for Piper control was not in any one or combination of the violations it seeks to lay at Chris-Craft's door step. The inducement was its own determination to have control.[10]

However, even if Bangor Punta were an apt plaintiff to raise the shield of the securities laws and rules for its protection, this Court would have great difficulty in finding—on facts and law—that a convincing case has been made out. Bangor Punta did not carry its burden of persuasion on the issues presented in its case against Chris-Craft. Its basic claim that Chris-Craft "manipulated" upward the price of Piper stock asks us to assume that Chris-Craft massaged the market against its own interest—since Chris-Craft was in an acquisition campaign—and that Bangor Punta, amply aware of what Chris-Craft was doing and bidding Chris-Craft up, was somehow victimized by this massaging.[11] The claim is patently untenable. Its claim that purchases of Chris-Craft common by institutions were arranged for manipulative or evasive reasons are

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[10] The disposition of this case and of *Chris-Craft* v. *Bangor Punta et al.*, S.D.N.Y. 69 Civ. 2227 eliminates any requirement for findings as to damages. Were such findings necessary, this Court could give no weight to the unsubstantiated and cursory evidence presented on behalf of Chris-Craft. On the other hand, the careful and well-documented analysis presented by the expert for Bangor Punta was persuasive in the main on the issue of fair market value of Piper stock in or about May, 1969 during, but uninfluenced by, the contest for control and fair market value uninfluenced by extraneous factors at the time of the trial herein in March, 1971.

[11] The willingness of an innocent buyer to pay a manipulated price does not deprive him of a right to complain of the manipulation. But the essence of a manipulation is the execution of transactions affecting prices or actual or apparent market activity for the purpose of inducing others to buy or sell. While Chris-Craft's initial and subsequent bids raised the prices of Piper stock these bids were for the *bona fide* purpose of acquiring stock for itself, not to induce others to buy the stock.

pure surmise—such basis as they do have is purely circumstantial and lacks the persuasive power needed to support such charges. The charge that in disposing of Chris-Craft holdings the institutions acted to produce the least possible disturbance of price does no more than charge the institutions with ordinary prudence in their management of their affairs.

The charge of violation of Section 17(a) of the Investment Company Act, 15 U.S.C. § 80a-17(a)(1971) has some surface plausibility but as little substance as the others. That section can apply to the Chris-Craft-Technology Fund transaction only upon a most abstrusely technical reading. It is not clear whether the mechanics of transfer and delivery and the "as of" dates for voting of Piper stock at a forthcoming meeting were such as to truly vest in Chris-Craft voting power for its 5% plus holding in Piper at the time. Even if it did have that power, the record before this Court is convincing that Chris-Craft, did not then or thereafter, exercise any controlling influence in Piper. Section 17(a) was designed to protect an investment company in its transactions with affiliates. In view of the price received by the Technology Fund ($65 per share as against the then market in the low fifties) and of subsequent events, it is difficult to discern any harm to the Fund in its sale of Piper stock to Chris-Craft. Bangor Punta is, under the circumstances, well beyond the pale of protection fairly intended by Section 17(a) of the Investment Company Act.

Bangor Punta's charges, compiled by able and diligent counsel, are an illuminating catalogue of pitfalls in the path of a contender for control of an unwilling target, competing with a well-financed adversary. However, the diligence is misplaced. The alleged breaches must not only be supported by credible evidence but must, importantly, be

causally linked to damages. The complaint falls short on both scores.

The complaint is dismissed for failure to sustain with credible evidence, the burden of proof cast upon the plaintiff.

The foregoing shall constitute the findings and conclusions required by F. R. Civ. P. 52(a).

So Ordered.

(original signed)

Milton Pollack
U. S. District Judge

December 10, 1971

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Final Judgment of Court of Appeals

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of April one thousand nine hundred and seventy-five.

Present:

HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS
Circuit Judges,

CHRIS-CRAFT INDUSTRIES INC.,
Plaintiff-Appellant,

v.

PIPER AIRCRAFT CORPORATION, CHARLES W. POOL, WALTER C. JAMOUNEAU, HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICHOLAS M. SALGO, DAVID W. WALLACE, HARRY S. BAKER, ROBERT L. CHAMBERS, JAMES S. GARVEY, WILLIAM E. HILL, CURTIS M. HUTCHINS, GEORGE S. JONES, FREDERICK H. KINGSBURY, WALTER B. MCKINNEY, W. GORDON ROBERTSON, GEORGE H. SEAL, ROBERT G. STONE, W. JEROME STROUT, JAMES G. TREMAINE, HARRY C. WOOD, THE FIRST BOSTON CORPORATION, PAUL L. MILLER, N. HAYARD,
Defendants-Appellees

AND

PIPER AIRCRAFT CORP., HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORP., NICHOLAS M. SALGO, DAVID W. WALLACE,
Defendants-Appellees-Appellants.

74-2542
75-7003

Final Judgment of Court of Appeals

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part, reversed and vacated in part and that the action be and it hereby is remanded to said District Court with instructions in accordance with the opinion of this court with costs to be taxed against defendants-appellees-appellants.

A. Daniel Fusaro,
Clerk

By Vincent A. Carlin,
Chief Deputy Clerk

Order of Court of Appeals Denying Petition for Rehearing on Final Judgment

United States Court of Appeals

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Ninth day of June, one thousand nine hundred and Seventy Five.

Present:

Hon. Walter R. Mansfield
Hon. James L. Oakes
Hon. William H. Timbers,
Circuit Judges.

Chris Craft Industries, Inc. *Plaintiff-Appellant* *v.* Piper Aircraft Corp. Charles W. Pool The First Boston Corporation Etc., *Defendants-Appellees* Piper Aircraft Corp. Howard Piper, Thomas F. Piper William T. Piper Jr. Bangor Corp. Nicholas M. Salfo, *Defendants-Appellees-Cross-Appellants*	Docket No. 74-2542

A petition for a rehearing having been filed herein by counsel for the defendant-appellee-cross-appellant, Bangor Punta Corp.,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro,
Clerk

Order of Court of Appeals Denying Petition for Rehearing on Final Judgment

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the NINTH day of JUNE, one thousand nine hundred and SEVENTY FIVE.

Present:

HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS,
Circuit Judges.

CHRIS CRAFT INDUSTRIES INC., *Plaintiff-Appellant* v. PIPER AIRCRAFT CORP. CHARLES W. POOL THE FIRST BOSTON CORPORATION ETC., *Defendants-Appellees* PIPER AIRCRAFT CORP. HOWARD PIPER THOMAS F. PIPER WILLIAM T. PIPER JR. BANGOR CORP. NICHOLAS SALGO, *Defendants-Appellees-Cross-Appellants*	Docket No. 74-2542

A petition for a rehearing having been filed herein by counsel for the defendant-appellee-First Boston Corporation.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk

Order of Court of Appeals Denying Petition for Rehearing on Final Judgment

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the NINTH day of JUNE, one thousand nine hundred and SEVENTY FIVE

Present:

HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS,
Circuit Judges.

CHRIS CRAFT INDUSTRIES INC., *Plaintiff-Appellant* v. PIPER AIRCRAFT CORP. CHARLES W. POOL THE FIRST BOSTON CORPORATION ETC., *Defendants-Appellees* PIPER AIRCRAFT CORP. HOWARD PIPER THOMAS F. PIPER WILLIAM T. PIPER JR., BANGOR CORP. NICHOLAS M. SALGO, *Defendants-Appellees-Cross-Appellants*	Docket No. 74-2542

A petition for a rehearing having been filed herein by counsel for the defendants-appellee-cross-appellant, Howard Piper, etc.,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk

Order of Court of Appeals Denying Petition for Rehearing in banc on Final Judgment

United States Court of Appeals

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Ninth day of June, one thousand nine hundred and seventy-five.

CHRIS CRAFT INDUSTRIES, INC.,
Plaintiff-Appellant

v.

PIPER AIRCRAFT CORP., CHARLES W. POOL, THE FIRST BOSTON CORPORATION, etc.
Defendants-Appellees

PIPER AIRCRAFT CORP., HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORP., NICHOLAS M. SALGO,
Defendants-Appellees-Cross-Appellants

Docket 74-2542

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellee-cross-appellant, Bangor Punta Corp a poll of the judges in regular active service having been taken and there being no majority in favor thereof

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN,
Chief Judge

Order of Court of Appeals Denying Petition for Rehearing In Banc on Final Judgment

United States Court of Appeals

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the NINTH day of JUNE, one thousand nine hundred and seventy-five.

CHRIS CRAFT INDUSTRIES INC.,
Plaintiff-Appellant

v.

PIPER AIRCRAFT CORP., CHARLES W. POOL, THE FIRST BOSTON CORPORATION, etc.,
Defendants-Appellees

PIPER AIRCRAFT CORP., HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORP., NICHOLAS M. SALGO,
Defendants-Appellees-Cross-Appellants

Docket No. 74-2542

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellee-cross-appellant, Howard Piper, etc. a poll of the judges in regular active service having been taken and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN,
Chief Judge

Order of Court of Appeals Denying Petition for Rehearing In Banc on Final Judgment

United States Court of Appeals

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of June, one thousand nine hundred and seventy-five.

CHRIS CRAFT INDUSTRIES INC., *Plaintiff-Appellant* v. PIPER AIRCRAFT CORP., CHARLES W. POOL, THE FIRST BOSTON CORPORATION, etc., *Defendants-Appellees*	Docket 74-2542
PIPER AIRCRAFT CORP., HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORP., NICHOLAS M. SALGO, *Defendants-Appellees-Cross-Appellants*	

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellee, First Boston Corporation, a poll of the judges in regular active service having been taken and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN,
Chief Judge

Interlocutory Judgment of Court of Appeals

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of March one thousand nine hundred and seventy-three.

Present:

HON. WALTER R. MANSFIELD
HON. WILLIAM H. TIMBERS
Circuit Judges
HON. MURRAY I. GURFEIN
District Judge

CHRIS-CRAFT INDUSTRIES, INC., *Plaintiff-Appellant,* v. PIPER AIRCRAFT CORPORATION, CHARLES W. POOL, WALTER C. JAMOUNEAU, HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA, CORPORATION, NICHOLAS M. SALGO, DAVID W. WALLACE, HARRY S. BAKER, ROBERT L. CHAMBERS, JAMES S. GARVEY, WILLIAM E. HILL, CURTIS M. HUTCHINS, GEORGE S. JONES, FREDERICK H. KINGSBURY, JR., WALTER B. MCKINNEY, W. GORDON ROBERTSON, GEORGE H. SEAL, ROBERT G. STONE, W. JEROME STROUT, JAMES G. TREMAINE, HARRY C. WOOD, THE FIRST BOSTON CORPORATION, PAUL L. MILLER and N. BAYARD, *Defendants-Appellees.*	72-1064

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Interlocutory Judgment of Court of Appeals

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO,
Clerk

Order Denying Petition for Rehearing on Interlocutory Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 72-1064

CHRIS-CRAFT INDUSTRIES, INC.,

Plaintiff-Appellant,

v.

PIPER AIRCRAFT CORPORATION, HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICOLAS M. SALGO, DAVID W. WALLACE, THE FIRST BOSTON CORPORATION, PAUL L. MILLER and NICHOLAS H. BAYARD,

Defendants-Appellees.

ORDER

Petitions for rehearing having been filed herein on March 30, 1973 on behalf of appellees Howard Piper, Thomas F. Piper and William T. Piper, Jr.; on behalf of appellees Bangor Punta Corporation, Nicolas M. Salgo and David W. Wallace; and on behalf of appellees The First Boston Corporation, Paul L. Miller and Nicholas H. Bayard; and

Due consideration by the undersigned members of the panel having been given to said petitions for rehearing; it is therefore

Order Denying Petition for Rehearing on Interlocutory Judgment

ORDERED as follows:

(1) That, with respect to the petition for rehearing on behalf of appellees Paul L. Miller and Nicholas H. Bayard, the said petition is granted to the extent that the main opinion filed herein on March 16, 1973 is amended by adding the following sentence at the end of the first paragraph concluding on slip opinion page 4965, line 12:

> "In view of the voluminous record, upon remand, the district court shall determine from the record whether, under the principles of liability regarding First Boston and its officers in this opinion, Paul L. Miller and Nicholas H. Bayard, or either of them, is individually liable."

(2) That in all other respects the said petitions for rehearing are denied.

Dated at New York, N.Y. this 25th day of April, 1973.

WALTER R. MANSFIELD

WALTER S. MANSFIELD
United States Circuit Judge

WM. H. TIMBERS

WILLIAM H. TIMBERS
United States Circuit Judge

MURRAY I. GURFEIN

MURRAY I. GURFEIN
United States District Judge

Order Denying Petition for Rehearing on Interlocutory Judgment

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of April, one thousand nine hundred and seventy-three.

CHRIS-CRAFT INDUSTRIES, INC.,

Plaintiff-Appellant,

v.

PIPER AIRCRAFT CORPORATION, HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICHOLAS M. SALGO, DAVID W. WALLACE, THE FIRST BOSTON CORPORATION, PAUL L. MILLER and NICHOLAS H. BAYARD,

Defendants-Appellees.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees, The First Boston Corporation, et al., and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO, *Clerk*

Order Denying Petition for Rehearing on Interlocutory Judgment

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of April, one thousand nine hundred and seventy-three.

CHRIS-CRAFT INDUSTRIES, INC.,

Plaintiff-Appellant,

v.

PIPER AIRCRAFT CORPORATION, HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICHOLAS M. SALGO, DAVID W. WALLACE, THE FIRST BOSTON CORPORATION, PAUL L. MILLER and NICHOLAS H. BAYARD,

Defendants-Appellees.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees, Bangor Punta, et al., and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO, *Clerk*

Order Denying Petition for Rehearing on Interlocutory Judgment

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of April, one thousand nine hundred and seventy-three.

CHRIS-CRAFT INDUSTRIES, INC.,

Plaintiff-Appellant,

v.

PIPER AIRCRAFT CORPORATION, HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICOLAS M. SALGO, DAVID W. WALLACE, THE FIRST BOSTON CORPORATION, PAUL L. MILLER and NICHOLAS H. BAYARD,

Defendants-Appellees.

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Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

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United States District Court

SOUTHERN DISTRICT OF NEW YORK

CHRIS-CRAFT INDUSTRIES, INC.,
Plaintiff,

—against—

PIPER AIRCRAFT CORPORATION, CHARLES W. POOL, WALTER C. JAMOUNEAU, HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICHOLAS M. SALGO, DAVID W. WALLACE, HARRY S. BAKER, ROBERT L. CHAMBERS, JAMES S. GARVEY, WILLIAM E. HILL, CURTIS M. HUTCHINS, GEORGE S. JONES, FREDERICK H. KINGSBURY, JR., WALTER B. McKINNEY, W. GORDON ROBERTSON, GEORGE H. SEAL, ROBERT G. STONE, W. JEROME STROUT, JAMES G. TREMAINE, HARRY C. WOOD, THE FIRST BOSTON CORPORATION, PAUL L. MILLER and N. BAYARD,
Defendants.

69 Civ. 2227 :MP

SECOND AMENDED COMPLAINT

Plaintiff, complaining of defendants, alleges on information and belief, except as to paragraphs 1, 3, 5, 9, 12, 17 through 19, 28, 29, 31, 33, 58, 59, and 63 through 66:

1. The jurisdiction of this Court is based upon 28 U.S.C. § 1331(a), Section 27 of the Securities Exchange Act of 1934, as amended (15 U.S.C. § 78aa), and Section 22 of the Securities Act of 1933, as amended (15 U.S.C. § 77v). This action is brought under Sections 9, 10, 14 and 16 of the Securities Act of 1934, as amended, Section 5 of the Se-

curities Act of 1933, as amended, and under the rules promulgated with respect to each such Act (collectively referred to herein as the "securities laws").

2. The acts, or some of them, constituting the violations of law complained of took place within the Southern District of New York.

3. Plaintiff Chris-Craft Industries, Inc. ("Chris-Craft") is a Delaware corporation having its principal executive offices in the City, County and State of New York. Shares of Chris-Craft's common and preferred stock and convertible debentures are traded on the New York Stock Exchange ("NYSE").

4. (a) Defendant Piper Aircraft Corporation ("Piper") is a Pennsylvania corporation having its principal place of business in Lock Haven, Clinton County, Pennsylvania.

(b) The following defendants (collectively referred to herein as the "Management Directors") were Directors of Piper and held the following positions with Piper until the date indicated, if any, of termination:

Director	Title	Termination
William T. Piper, Jr.	Chairman of the Board and President	Resigned as Chairman August 12, 1969
Thomas F. Piper	Vice President	Resigned as a Director August 12, 1969
Howard Piper	Executive Vice President	Resigned as a Director August 12, 1969
Charles W. Pool	Treasurer	Resigned as a Director August 12, 1969 and as Treasurer November 6, 1969
Walter C. Jamouneau ...	Secretary	Resigned as a Director and as Secretary August 12, 1969

(c) The Piper Board of Directors is presently constituted as follows:

Name	Other positions and offices with Piper	Principal occupation or employment
Nicholas M. Salgo	Chairman of the Board	Chairman of the Board Bangor Punta Corporation
David W. Wallace	Assistant Vice President	President and Chief Operating Officer, Bangor Punta Corporation
W. Gordon Robertson ...	None	General Trustee of Bangor Punta's Employee Benefit Program
Dudley C. Phillips	Assistant Vice President— Assistant Secretary	Vice President and General Counsel, Bangor Punta Corporation
W. T. Piper, Jr.	President	President Piper Aircraft Corporation
C. Leonard Gordon	None	Vice President and General Counsel Chris-Craft Industries, Inc.
Lawrence R. Barnett	None	Vice President Chris-Craft Industries, Inc.
James J. Rochlis	None	Executive Vice President Chris-Craft Industries, Inc.

5. Chris-Craft owns 697,495 shares of Piper common stock, constituting approximately 42% of Piper's issued and outstanding shares of stock.

6. (a) Defendant Bangor Punta Corporation ("Bangor Punta"), a Delaware corporation, is publicly held. Shares of Bangor Punta's common and preferred stock are traded on the NYSE. Bangor Punta presently owns approximately 838,156 shares of Piper stock, constituting approximately 51% of Piper's issued and outstanding shares of stock. Bangor Punta has been exercising working control over the affairs and policies of Piper since August 1969.

(b) Defendant Nicholas M. Salgo is the Chairman of the Board and defendant David W. Wallace is the President and a director of Bangor Punta.

(c) Defendants Harry S. Baker, Robert L. Chambers, James S. Garvey, William E. Hill, Curtis M. Hutchins, George S. Jones, Frederick H. Kingsbury, Jr., Walter B. McKinney, W. Gordon Robertson, George H. Seal, Robert G. Stone, W. Jerome Strout, James G. Tremaine and Harry C. Wood were the other members of the Board of Directors of Bangor Punta in May 1969.

7. Defendant The First Boston Corporation ("First Boston") is an investment banking corporation doing business in the City, County and State of New York. Defendant Paul L. Miller is the President of First Boston and defendant N. Bayard is an officer, employee or agent thereof. First Boston, Miller and Bayard acted as the agents of the Management Directors, the Piper family and of Bangor Punta in bringing about the transactions complained of herein.

COUNT ONE

Background

8. Piper is a publicly held corporation engaged in the manufacture of light aircraft. The capital stock of Piper consists of 5,000,000 authorized shares of $1.00 par value common stock, of which approximately 1,644,790 shares are issued and outstanding. Piper's stock was listed on the NYSE from 1957 until delisted during 1969 and is now registered on the Philadelphia-Baltimore-Washington Stock Exchange ("PBWSE").

9. On January 23, 1969, Chris-Craft publicly announced (a) that it had acquired a stock interest in Piper, (b) that it was making an offer (the "Chris-Craft tender offer") to all Piper shareholders to purchase 300,000 shares of Piper stock at a price of $65 a share, and (c) that Chris-Craft proposed to take additional steps to acquire sufficient shares to obtain control of Piper. On the day preceding these announcements, the closing price of Piper on the NYSE was $52.50.

10. In willful violation of the securities laws, the Management Directors conspired among themselves and with others, including First Boston and Bangor Punta, to perpetuate themselves in control of Piper and to interfere with Chris-Craft's offers to purchase Piper stock in at least the following respects:

(a) making, in communications disseminated to Piper's shareholders, the investment community and the public at large, untrue statements of material facts and omitting to state material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading;

(b) engaging in acts, practices and courses of business, which have operated and are now operating as a fraud upon Chris-Craft, the other shareholders of Piper, the investment community and the public, and employing devices, schemes and artifices to defraud such persons;

(c) engaging in manipulative and deceptive contrivances and practices to manipulate downward the price at which shares of the stock of Chris-Craft traded on the NYSE, and to manipulate upward the price at which shares of Piper and Bangor Punta traded on the NYSE;

(d) illegally offering to sell securities of Piper and Bangor Punta, through the use of a prospectus and otherwise, when no registration statement was in effect as to such securities; and

(e) illegally purchasing securities of Piper which carried with them the right to purchase securities of Bangor Punta in which a distribution was then being made, at the times and in the manner set forth in Count Three herein.

One of the effects of such acts and courses of conduct was to mislead Chris-Craft and the public as to the true value of Piper stock.

11. In furtherance of said conspiracy, the defendants have engaged in the acts described below, among others, in which the mails, means and instrumentalities of interstate commerce, and the facilities of the NYSE have been used.

The Chris-Craft Tender Offer

12. On January 24, 1969, Chris-Craft made its tender offer to the shareholders of Piper for 300,000 or more shares of Piper stock for cash at $65 per share. For the purpose of interfering with Chris-Craft's tender offer and depriving Piper shareholders of the opportunity to evaluate the offer on its merits, the Management Directors sent, through the mails, letters to the shareholders of Piper, including shareholders in the Southern District of New York, which stated, among other things:

(a) by letter dated January 27, 1969: "Your Board of Directors has carefully studied this [Chris-Craft] offer and is convinced that it is inadequate and not in the best interests of Piper shareholders"; "Piper's stock has traded as high as $72.25 on the New York Stock Exchange within the past eight months"; and "Piper's sales increased more than 20% in fiscal 1968 over the prior year, and its earnings per share were approximately 29% higher";

(b) by letter dated January 28, 1969: "Your management firmly believes that this [Chris-Craft] offer is inadequate and not in the best interests of Piper shareholders."

13. The aforesaid letters were false and misleading, and known to be such by the Management Directors, in that they:

(a) concealed the fact that First Boston, Piper's investment banker, had advised Piper that the price of $65 a share was a fair price for a shareholder to receive for his Piper stock;

(b) concealed the fact that during the summer of 1968, when Piper stock had traded as high as $72.25 on the NYSE, the Management Directors regarded the price as so attractive that some of them sold their own Piper stock, and thereafter the stock had declined to as low as $50.875 a share;

(c) concealed the fact that the Management Directors controlled approximately 10% more of the outstanding stock of Piper than had been disclosed in filings with the Securities and Exchange Commission ("SEC");

(d) concealed the fact that the Management Directors had planned as early as August 1968 to oppose any attempts by outsiders to acquire control of Piper regardless of any benefits that might accrue to Piper and its shareholders and that no serious discussions or study was had of Chris-Craft's offer;

(e) failed to state that Piper's sales had dropped by over 10% in the first quarter of fiscal 1969 from sales in the first quarter of fiscal 1968, and that Piper's earnings had dropped by almost 30% compared to the equivalent quarter of the prior year, which facts were known to the Management Directors prior to January 27, 1969 but not disclosed until January 29, 1969;

(f) concealed the fact that the Management Directors had discussed and expressed concern about the deteriorating financial condition, production and engineering capabilities of Piper, including the facts that (i) the market for single engine aircraft was deteriorating, (ii) Piper could not afford to develop new markets, (iii) manufacturing at Lock Haven was in a confused state and unable to meet schedules, (iv) engineering schedules had not been met for years, (v) significant changes in Piper's management and systems were re-

quired before sales could be increased, and (vi) the morale of employees at Piper's main plant was at a low point and worsening;

(g) concealed the fact that one of Piper's more popular aircraft, designated as the PA-30 and known as the Twin Comanche, almost 2,000 of which were sold since 1964, had an unsatisfactory safety record which had caused and was continuing to cause materially sharp increases in the cost of insurance and would require an expensive retrofit program, in addition to other adverse consequences therefrom;

(h) concealed the fact that its efforts to design a plane, to be known as the Pocono, for the rapidly expanding commuter aircraft market were not successful, that the plane never had adequate power, and that there was a substantial prospect, which came to pass in late August 1969, that the project would have to be abandoned, leaving idle a plant which had been constructed at great cost to manufacture the Pocono.

The Transaction With Grumman

14. In a further effort to interfere with Chris-Craft's tender offer, on January 29, 1969 the Management Directors caused Piper to announce through interstate news media and the mails (for dissemination to their shareholders and the public, including persons in the Southern District of New York) that Grumman Aircraft Engineering Corporation ("Grumman") had "agreed to purchase 300,000 shares of [Piper's] authorized but unissued common stock at $65 per share." Piper's announcement further stated:

> "The sales agreement is subject to various conditions, including that the shares be listed on the New York Stock Exchange, that there be no material adverse change in the business of Piper and that there be no change in control of Piper."

15. Piper's announcement of the Grumman transaction was false and misleading in that it failed to disclose, among other things, that:

(a) Grumman had the right, in its unilateral discretion, to sell back the stock to Piper over a seven month period (hereinafter the "option period") at a price of $65 per share, plus interest;

(b) during the option period, Piper was precluded under the agreement from using or commingling the funds for the 300,000 shares of Piper stock, while Grumman was free during the option period to hold and vote the Piper shares;

(c) because of the fact that the agreement amounted in effect to no more than an option, the Management Directors and First Boston knew that the 300,000 Piper shares to be issued to Grumman during the option period could not be listed on the NYSE, a necessary condition to the agreement;

(d) consummation of the agreement with Grumman would be in violation of Section 7 of the Clayton Act (15 U.S.C. § 18); and

(e) the Grumman transaction was designed to interfere with Chris-Craft's tender offer and to manipulate downward and depress the market price of Chris-Craft stock on the NYSE.

16. The agreement with Grumman, which was brought about by First Boston, Miller and Bayard, was illusory and one-sided. It was intended as, and operated as, a fraudulent scheme and artifice to interfere with Chris-Craft's tender offer, to manipulate the price of Chris-Craft stock downward and the price of Piper stock upward, and to make the shareholders of Piper less likely to sell their shares to Chris-Craft.

17. As a result of the foregoing announcements and conduct by the Management Directors, First Boston, Miller and

Bayard, Chris-Craft was caused to believe that its investment in Piper stock was worth $65 per share, it acquired fewer shares of Piper stock under its tender offer than it would have acquired in the absence of such fraudulent conduct and the market price of Chris-Craft was artificially manipulated downward from the price of $51.50 a share at which it was trading when Chris-Craft first announced its interest in Piper.

18. After Chris-Craft's tender offer had terminated on February 3, 1969, Piper and Grumman announced that their agreement had been terminated.

Chris-Craft's Registration Statement for its Exchange Offer

19. On February 27, 1969 Chris-Craft filed its registration statement and form of prospectus with the SEC in connection with its exchange offer to Piper's shareholders (the "Chris-Craft exchange offer") by which Chris-Craft proposed to offer to exchange certain of its own securities for 300,000 Piper shares, with the right to buy an additional 100,000 shares. Chris-Craft reserved the right to terminate its offer, among other reasons, upon any material increase in the aggregate number of outstanding shares of Piper stock or material change in the capitalization of Piper.

20. Since the consideration to be received by Piper's shareholders who delivered their shares to Chris-Craft consisted of securities of Chris-Craft, the Management Directors and First Boston knew that any decline in the price of Chris-Craft's stock would adversely affect the offer, as would any increase in the number of Piper shares outstanding.

The U.S. Concrete and Southply Transactions

21. On March 22, 1969, while Chris-Craft's registration statement was under review at the SEC, the Management

Directors, at the insistence of First Boston, caused Piper to enter into:

(a) an agreement with United States Concrete Piper Company ("U.S. Concrete") and Pittsburgh Coke & Chemical Company ("Pittsburgh Coke") whereby Piper would acquire all of the outstanding shares of their subsidiary, United States Concrete Pipe Company of Florida ("U.S. Concrete Florida") in exchange for 320,000 shares of authorized but unissued common stock of Piper; and

(b) an agreement with certain stockholders of Southply, Inc. ("Southply") under which Piper would acquire 99.466% of the outstanding shares of Southply in exchange for 149,199 shares of authorized but unissued stock of Piper.

22. The 149,199 shares which Piper agreed to issue for the stock of Southply had a market value, based on the last price on the NYSE, of over $10,600,000. Southply's net worth as of December 31, 1969 was minus $10,582 and it had sustained net losses in 1968 of $58,499 and in 1967 of $529,671. The stock which Piper agreed to issue for Southply had a value of at least $10,000,000 in excess of the value of Southply.

23. The 320,000 shares of Piper stock which Piper agreed to issue for the acquisition of U.S. Concrete Florida had an aggregate value of approximately $22,800,000 based on the last price on the NYSE. In its annual financial statement, issued to stockholders on March 21, 1969, only one day before the agreement with Piper, Pittsburgh Coke represented that U. S. Concrete, including its subsidiary U. S. Concrete Florida, had a fair value, based on underlying net assets, of only $16,535,000 and that in an attempted disposition the price might well be less. In addition, eight private treble damage antitrust actions were pending against U. S.

Concrete involving the very business which Piper agreed to buy. The stock which Piper agreed to issue for U. S. Concrete Florida had a value of at least $7,000,000 in excess of the value of U. S. Concrete Florida.

24. At the time they caused Piper to enter into the agreement for the acquisition of Southply and U. S. Concrete Florida, the Management Directors, First Boston, Miller and Bayard were aware of the provisions of Piper's Listing Agreement with the NYSE and of the applicable rules of the NYSE, by which it was necessary (a) for a listing application to be approved by the NYSE prior to the issuance of Piper stock to U. S. Concrete and to the shareholders of Southply, and (b) for the proposed issuance to be authorized by Piper's shareholders before any application would be approved by the NYSE.

25. The agreements for the purchase of Southply and U.S. Concrete Florida were fraudulently entered into for the purpose of interfering with Chris-Craft's exchange offer and were intended to have the effect of diluting Piper's stock so as to keep control of Piper in the Management Directors and make it impossible for the exchange offer to succeed. The agreements constituted a device and artifice to manipulate the price of Chris-Craft downward and to defraud Chris-Craft and other purchasers of Piper stock who relied upon Piper's Listing Agreement with the NYSE and the obligations of the Management Directors to adhere to the NYSE rules prohibiting such dilution of the shareholders' interest without their approval.

26. The Management Directors, First Boston, Miller and Bayard were well aware that the shareholders of Piper would not approve the issuance of the 469,199 shares of Piper stock for U.S. Concrete Florida and Southply, and that this transaction could not, therefore, be consummated under the NYSE rules and Piper's Listing Agreement.

27. Nevertheless, intent only on blocking Chris-Craft's exchange offer, the Management Directors, First Boston, Miller and Bayard on or about March 24, 1969, in knowing and willful violation of the NYSE rules and the Listing Agreement, caused Piper to issue the 469,199 shares of Piper stock in exchange for Southply and U.S. Concrete Florida without seeking or obtaining the approval of Piper's shareholders and without the approval of a listing application for such shares by the NYSE. When Bankers Trust Company, Piper's sole Registrar, refused to register the new issue of Piper stock and Manufacturers Hanover Trust Company, Piper's sole Transfer Agent, refused to issue certificates of the stock, the Management Directors caused Piper to issue spurious certificates to U.S. Concrete and the Southply Shareholders.

28. On March 31, 1969 Chris-Craft brought an action in the Supreme Court of the State of New York, County of New York, against Piper, the Management Directors, and others to enjoin or rescind the issuance of the aforesaid 469,199 shares of Piper, in which action a temporary restraining order was entered enjoining the further consummation of such transactions and preventing the issuance of Piper stock without prior NYSE approval.

29. On April 3, 1969, after the Management Directors refused to take any steps to rescind the issuance of said shares, the NYSE Board of Governors directed that trading in Piper's stock be suspended and that a delisting application be filed forthwith with the SEC, and announced that Piper had violated its Listing Agreement and the NYSE rules.

30. Such NYSE action was deliberately brought about by the Management Directors, with the assistance of First Boston, Miller and Bayard, for the purposes of (a) depriving Chris-Craft and the other shareholders of Piper of

the benefits of NYSE listing, (b) discouraging Chris-Craft from proceeding with its exchange offer and causing the processing of the Chris-Craft exchange offer to be delayed by the SEC until the Southply and U.S. Concrete Florida transactions could be rescinded and Piper readmitted to trading on the NYSE, and (c) manipulating downward the price of Chris-Craft so that its exchange offer would be unsuccessful, or at least more costly.

31. On or about April 14, 1969 Piper rescinded its acquisition of Southply and U.S. Concrete Florida and the purported issuance of 469,199 Piper shares. As a result of this action which Chris-Craft had demanded, effective April 21, 1969 the NYSE ended its suspension of trading in Piper stock, and withdrew its delisting proceedings against Piper.

Piper's Issuance of False and Misleading Financial Statements

32. On or about April 29, 1969 the Management Directors caused Piper to issue and publicly announce a false and misleading financial statement for the six months ended March 31, 1969. Said financial statement represented that Piper's per share earnings were the same as the equivalent 1968 period when in fact they were materially less, which distortion was accomplished by the adoption of a new accounting method to raise earnings in 1969 without stating that a comparable adjustment was not being made in the 1968 figures and by the deliberate deferral of certain material losses to a later reporting period.

Entry of Bangor Punta into Conspiracy

33. On May 7, 1969 Chris-Craft defined and publicly announced the terms of its exchange offer to buy 300,000 shares of Piper stock with the right to buy an additional 100,000 shares which, if successful, would have given Chris-Craft a majority of Piper's issued and outstanding stock.

In exchange for each share of Piper stock, Chris-Craft proposed to offer one share of new Chris-Craft $2 preferred stock and two warrants to buy one share each of Chris-Craft common stock.

34. In further pursuit of their aforesaid plan and scheme, the Management Directors, First Boston, Miller and Bayard, having failed in their other efforts to stop Chris-Craft from making its exchange offer, enlisted defendants Bangor Punta, Salgo and Wallace and the other Bangor Punta directors in their unlawful scheme to interfere with and render unsuccessful Chris-Craft's exchange offer.

35. On May 8, 1969 the defendants caused Piper and Bangor Punta to issue press releases and statements (hereinafter the "Piper-Bangor Punta announcement") to be disseminated through the means and instrumentalities of interstate commerce, including in the Southern District of New York, wherein it was stated (1) that Bangor Punta had agreed to acquire more than 500,000 shares of Piper stock from the Piper family, (2) that the agreement is a first step in a proposed consolidation of Bangor Punta and Piper, (3) that under the agreement and exchange offer the shareholders of Piper would receive a "package of Bangor Punta securities to be valued in the judgment of First Boston Corp. at not less than $80 per Piper share," (4) that the "sales of the combined companies would reach $450,000,000 in fiscal 1969 with about $180,000,000 or 40% in the aircraft, recreational and leisure time fields," and (5) that Bangor Punta was to make an "exchange offer," while also stating that a "merger" of the two companies would bring Bangor Punta into the light aircraft business.

36. The Piper-Bangor Punta announcement was false and misleading in that it failed to disclose:

(a) that Bangor Punta, the Piper family and First Boston did not intend that the package of securities to

be offered to the Piper shareholders would have a market value or resale value of $80 per Piper share and knew that the package would have to consist primarily of marginal and unlisted securities, such as warrants and debentures, exercisable and convertible at prices far in excess of the market value of Bangor Punta common stock;

(b) that an offering of Bangor Punta securities in exchange for shares of Piper could be made only by registration statement filed with and cleared by the SEC;

(c) that no registration statement had been filed by Bangor Punta with the SEC and that, when filed, it would take a considerable amount of time for clearance;

(d) that the announcement itself was a violation of SEC rules, including Rule 135, and, as a result, subjected Bangor Punta to sanctions;

(e) that although the press release suggested that there would be a merger of Piper and Bangor Punta the directors of Piper had not even been asked to consider an agreement with Bangor Punta, or told that such an agreement was pending; and

(f) that the Piper family would receive a bonus for its stock, that could exceed $13,000,000, if they succeeded in persuading the independent shareholders of Piper not to tender their shares to Chris-Craft, but to sell or tender sufficient shares to Bangor Punta to give it more than 50% of the outstanding shares of Piper.

37. So eager were defendants to interfere with Chris-Craft's exchange offer, as described in Chris-Craft's May 7, 1969 announcement, that they issued the aforesaid May 8, 1969 announcement without even waiting for all the parties to execute the May 8 agreement. In order to induce several members of the Piper family subsequently to execute the

May 8 agreement, defendants William T. Piper, Jr., Howard Piper and Thomas F. Piper, with the assistance of First Boston, entered into a secret side-agreement by which such family members were guaranteed a cash resale value for the Bangor Punta securities received by them in the exchange offer in an amount not less than a value to be confidentially placed on such securities by First Boston.

38. The Piper-Bangor Punta announcement, and the understandings of the defendants with respect thereto, were designed for the purpose of interfering with Chris-Craft's exchange offer and were calculated to have and did have the effect of artificially manipulating downward the price at which shares of Chris-Craft were traded on May 8, 1969 from a high of $48.25 per share to a low of $44.50 per share, while causing the price of both Piper and Bangor Punta to increase, thus adversely affecting Chris-Craft's exchange offer.

Parking Arrangements for Piper Stock

39. Prior to May 8, 1969 in violation of SEC Rule 10b-5 and interpretations of the rule upon which defendants claimed to rely in making the May 8 announcement, defendant Salgo secretly tipped at least one broker to the fact that Bangor Punta intended to enter into an agreement with the Piper family to seek control of Piper. Such advance information was given for the purpose of (a) enabling the broker to purchase Piper stock on the open market for resale to Bangor Punta, (b) depriving Chris-Craft of the opportunity of acquiring said shares on its exchange offer, and (c) assuring Bangor Punta in advance of its agreement with the Piper family that it would be able to secure working control of Piper to the detriment of Chris-Craft. Piper shares acquired as a result of such advance information were in fact resold to Bangor Punta and not tendered to Chris-Craft.

40. After the May 8, 1969 announcement, the defendants, or some of them, continued to encourage others to purchase

shares in the open market with the understanding that they would be resold to Bangor Punta and not tendered to Chris-Craft.

Illusory Market Strength of Bangor Punta Stock

41. For the purpose of providing artificial support to the value of Bangor Punta common stock, between the May 8, 1969 announcement and the close of Bangor Punta's exchange offer, at least the major institutional creditor and equity holder of Bangor Punta, which was in a control position, purchased 160,000 shares or more of Bangor Punta common stock on the open market in scattered transactions to create the impression that broad-based market strength existed for such securities.

Recommendations by the Piper Family

42. By means of misleading communications, following May 8, 1969, Piper and the Management Directors, with the knowledge and at the request of Bangor Punta, engaged in efforts to induce the shareholders of Piper to tender their shares to Bangor Punta rather than to Chris-Craft, to wit:

(a) By letter dated June 4, 1969 on the letterhead of Piper signed by defendant W. T. Piper, Jr., as Chairman and President of Piper, Piper described the terms of Bangor Punta's exchange offer contained in its preliminary prospectus dated May 29, 1969, and urged them: "In your own interests . . . to read and study this material carefully."

(b) By letter dated June 20, 1969, on the letterhead of Piper and signed by defendant W. T. Piper, Jr., all Piper shareholders were advised that the Executive Committee of Piper believed that the Chris-Craft offer "is not in your best interests and you should therefore continue to reject it." The letter went on to make specific criticisms of the Chris-Craft exchange offer, and stated in bold print that no member of Piper's management would accept the Chris-Craft offer.

(c) By letter dated July 25, 1969 and signed by defendant W. T. Piper, Jr., Piper's shareholders were told that the Piper Board of Directors "strongly recommend that you accept the Bangor Punta offer" which became effective on July 18, 1969 and that "a combination with Bangor Punta is in the best interests of all the shareholders." Piper's shareholders were further told not to hesitate to telephone defendant First Boston, and even provided its number in New York.

43. The aforesaid letters were misleading in material respects in that they failed to disclose:

(a) that under the terms of the May 8, 1969 agreement the Piper family stood to gain over $13,000,000 from promoting the Bangor Punta offer over the Chris-Craft offer and by inducing Piper shareholders to tender or otherwise sell to Bangor Punta a majority of Piper's outstanding stock;

(b) that the side-agreement described in paragraph 37 herein had been entered into which guaranteed a select group of family members a certain resale value for the Bangor Punta securities to be received by them;

(c) that the principal members of Piper's management were under a contractual obligation to tender to Bangor Punta, and could not therefore consider acceptance of the Chris-Craft offer;

(d) that Piper's financial analysts had concluded that the Bangor Punta offer was detrimental to the interests of Piper; and

(e) that criticisms which Piper made of the Chris-Craft exchange offer, such as that it was a fully taxable

transaction and required an irrevocable proxy, also applied to the Bangor Punta offer.

44. The Management Directors also caused Piper to hire at Piper's expense but for their benefit a proxy solicitation firm to urge Piper's shareholders not to tender to Chris-Craft but to tender to Bangor Punta. Said firm, acting on behalf of the Piper family, Piper and Bangor Punta at the same time, emphasized that the Piper management favored the Bangor Punta offer but failed to disclose the facts described above and repeated misleading statements contained in Bangor Punta's prospectus.

The Misleading Bangor Punta Prospectuses

45. The defendants sought to induce, and did induce, Piper shareholders to accept the Bangor Punta exchange offer, and to reject the Chris-Craft exchange offer, by means of false and misleading preliminary and final prospectuses dated May 29, 1969 and July 18, 1969, respectively, which were disseminated to all Piper shareholders.

46. Said prospectuses were prepared by Bangor Punta, and information on Piper was supplied by Piper and by the Management Directors. First Boston acted on both sides of the transaction, was designated in the prospectuses as "Dealer-Manager" of the exchange offer and consented to the use of its name on said prospectuses with the intention that it be relied upon by the Piper shareholders.

47. The preliminary and final prospectuses were false and misleading in material respects, including the following:

(a) The prospectuses reported that Bangor Punta, on a consolidated basis, had a shareholders equity of $120,081,338, without disclosing that the consolidated assets had been overstated by approximately $22,000,000, representing about 20% of its net worth and including a

$14,000,000 overstatement of the assets of the Bangor and Aroostook Railroad. On or about December 2, 1969, after it had acquired over 50% of the stock of Piper, Bangor Punta announced that for the year ended September 30, 1969, it had written off or down approximately $22,000,000 in assets carried on its financial statements in the July 18, 1969 prospectus.

(b) The prospectuses carried the assets of the Bangor and Aroostook Railroad at $19,000,000, and described the railroad as a going business without disclosing that it was negotiating to sell the railroad, and had reached an agreement in principle with a buyer to sell the railroad for only $5,000,000, subject to approval of Bangor Punta's Board of Directors and the Interstate Commerce Commission, which agreement was not to be finalized or disclosed until the exchange offer was completed.

(c) The prospectuses described the May 8, 1969 agreement between the Piper family and Bangor Punta without disclosing that the secret side-agreement described in paragraph 37 herein had been entered into guaranteeing said members of the Piper family a certain cash resale value not disclosed to or made available to other members of the Piper family or to the public shareholders of Piper. Said side-agreement was not revealed to plaintiff until April 1970, when it was subpoenaed from a member of the Piper family.

(d) The prospectuses did not disclose the inherent conflict of interest of First Boston in that it was acting as Dealer-Manager for Bangor Punta and as agent for Piper and the Piper family and was to pass upon the value of the securities package to be offered to the public. This conflict of interest acted to the great detriment of Chris-Craft and the public in that First Boston did not act in accordance with its obligations under the se-

curities laws when it did not make or require disclosure of the secret side-agreement described in paragraph 37 herein or the confidential opinion which it was asked to give and gave pursuant to and in furtherance of that agreement.

(e) The prospectuses failed to disclose the safety problems relating to the operation of the Piper PA-30 airplane and that it would be necessary for Piper to undertake a retrofit of the almost 2,000 such aircraft in the hands of the public.

(f) The prospectuses failed to disclose that, in part as a result of the accident rate of the PA-30, Piper's insurance premium had been materially increased. To conceal this fact, premium expense which therefore had been shown separately was lumped into general administrative expense.

(g) The prospectuses failed to disclose that serious difficulties had been encountered in the production of the Pocono, which would require the termination of plans to produce this model and the idling of a $2,000,000 plant constructed to produce it.

(h) The prospectuses repeated the misleading comparison, described at paragraph 32 herein of the six-month earnings for 1969 with the six-month earnings for 1968, without disclosing that expenses properly chargeable to the six-month 1969 period were being allocated to a later period not shown in the prospectus. It was not disclosed that, using the same accounting method for the first six months of 1969 as had been used for 1968 earnings, Piper's earnings would have been materially lower for the first six months of 1969.

(i) The prospectuses did not fairly show the dilution in Bangor Punta's earnings which would result from the warrants to be issued pursuant to the exchange offer.

(j) The prospectuses failed to disclose the effect that Bangor Punta's cash purchases of shares of Piper stock between May 14 and May 23, 1969 had in the marketplace, as alleged in Count Three herein.

48. In its final prospectus Bangor Punta made a disclaimer for the first time that "No guarantee of, or representation as to, the value of the securities and/or cash offered by Bangor Punta pursuant to the Exchange Offers is or can be made."

49. Although the press release which implanted the notion that the offer would be worth $80 a share, and the preliminary prospectus which perpetuated it had been given wide circulation for several months, Bangor Punta set a closing date of merely five business days for its exchange offer so that Piper shareholders would be pressured into tendering their stock to Bangor Punta and rejecting the Chris-Craft exchange offer without discovering that the market value of the Bangor Punta exchange offer was substantially less than the promised $80 a share.

50. In fact, at no time after the effective date of its exchange offer did the Bangor Punta securities package have a market value of as much as $80 a share, and even on the date the exchange offer closed on July 29, 1969 its value had declined to approximately $70.

51. By reason of the foregoing acts and misrepresentations, Bangor Punta received from the public on its exchange offer 111,628 shares of Piper which otherwise would not have been tendered to it and might have been tendered to Chris-Craft. These shares, together with the Piper family shares and the 120,200 shares of stock unlawfully acquired for cash as described in Count Three herein, gave Bangor Punta working control of Piper, which was accomplished by the reconstitution of the Piper Board of Directors referred to in paragraph 4 herein.

Post-Exchange Offer Purchases

52. After the expiration of its exchange offer, and with working control of Piper, Bangor Punta continued to purchase shares of Piper stock for cash in transactions arranged by the Management Directors in furtherance of their efforts to obtain a bonus of up to $13,000,000 under the May 8, 1969 agreement. Bangor Punta also secretly purchased shares of Piper stock on the PBWSE until it acquired a majority of Piper outstanding stock.

53. In such manner, subsequent to August 8, 1969 Bangor Punta purchased for cash approximately 103,975 of Piper stock, which increased its percentage interest in Piper from approximately 45% to approximately 50.9% of the outstanding Piper shares.

COUNT TWO

54. Chris-Craft repeats the allegations of paragraphs 1 through 7, 35, 38, and 48 through 51, as if the same were set forth at length herein.

55. The Piper-Bangor Punta May 8, 1969 announcement was made at a time when no registration statement covering the Bangor Punta securities to be exchanged was in effect and constituted the use of means or instruments of interstate commerce to offer to sell such securities through the use of a prospectus or otherwise, in violation of Section 5 of the Securities Act of 1933, as amended, and Rule 135 promulgated thereunder.

56. The defendants were well aware that the SEC had recently, in a well-publicized ruling, adopted sanctions against a company making an exchange offer which had made an announcement of a less inflammatory nature than the Piper-Bangor Punta announcement. With this knowledge, the defendants willfully and maliciously caused the announcement to be issued in order to interfere with the Chris-Craft exchange offer.

COUNT THREE

57. Chris-Craft repeats the allegations of paragraphs 1 through 53, as if the same were set forth at length herein.

58. On April 7, 1969, at a meeting called by the SEC, the staff of the SEC informed Chris-Craft (a) that any further purchases by Chris-Craft of shares of Piper stock, other than by means of the exchange offer, would be regarded by the SEC as in willful violation of Section 10 of the Securities Exchange Act of 1934 and Rule 10b-6 thereunder, and would subject it to the penalties for willful violation of securities laws, (b) directed Chris-Craft not to purchase shares of Piper stock during the pendency of its exchange offer and (c) informed Chris-Craft that Piper was being advised that this same warning and direction applied to shares of Piper stock by it, its management and by any third parties acting in concert with any of them.

59. Chris-Craft made no purchases of shares of Piper stock from the time it received the directive from the SEC on April 7, 1969 until after the close of its exchange offer.

60. Bangor Punta, between May 14 and May 23, 1969, acted in willful violation of Section 10 of the Securities Exchange Act of 1934 and Rule 10b-6 thereunder, and purchased 120,200 shares of Piper stock, thereby gaining a decided advantage over Chris-Craft in the struggle for control of Piper.

61. In response to Bangor Punta's illegal cash purchases of 120,200 Piper shares, the price at which Piper stock was trading on the NYSE increased between May 14 and May 23, 1969 from approximately $72.50 to a high of $77.50, causing many Piper shareholders to assume that the price increase had resulted solely from the bullish effect of Bangor Punta's exchange offer on the market and to decide to tender to Bangor Punta rather than to Chris-Craft under its competing tender offer.

RELIEF UNDER ALL COUNTS

62. As a result of the foregoing acts and courses of conduct, Bangor Punta ultimately acquired 838,156 shares of Piper, or 50.9% of Piper's outstanding stock. It has thus secured the power to elect a majority of the Board of Directors, to declare or withhold dividends, to appoint officers and to dominate completely Piper's affairs, even to the extent of causing a merger or issuing new shares of stock without the consent of the other shareholders.

63. Chris-Craft owns 697,495 of Piper stock, or 42.6% of Piper's outstanding stock, acquired at a cost of over $45,000,000 in cash and in the value of its securities.

64. The foregoing acts and courses of conduct by the defendants misled Chris-Craft and caused it to buy shares of Piper at prices substantially in excess of their true value, required Chris-Craft to incur substantial costs and expenses to protect its interest in Piper and sharply decreased the value of Chris-Craft's holdings in Piper, which has caused Chris-Craft damages of at least $44,000,000.

65. But for the unlawful acts of the defendants described herein, Chris-Craft would have achieved control of Piper, or at least the price of Piper common stock during 1969 would not have been at the artificially high level to which it was driven by defendants' unlawful conduct.

66. Chris-Craft has no adequate remedy at law.

WHEREFORE, Chris-Craft demands judgment:

1. Enjoining and restraining defendant Bangor Punta and all persons acting on its behalf from voting all shares of Piper which it acquired in violation of the securities laws subsequent to May 8, 1969, as long as such shares of Piper stock are held directly or indirectly by Bangor Punta.

2. Requiring Bangor Punta to divest, by public auction or in such other manner as the Court may prescribe, all shares of Piper stock acquired by it in violation of the securities laws, including (a) the 120,200 shares purchased between May 14 and 23, 1969, (b) approximately 111,628 shares acquired pursuant to its July 18, 1969 exchange offer and (c) approximately 103,975 shares acquired subsequent to August 8, 1969.

3. Requiring defendants to pay to Chris-Craft compensatory damages to be determined by the Court and estimated as of the date of this complaint to be no less than $44,000,000, together with punitive damages in the amount of $1,000,000.

Dated: New York, N. Y.
June 9, 1970

PAUL, WEISS, GOLDBERG, RIFKIND,
WHARTON & GARRISON

/s/ ARTHUR L. LIMAN
Arthur L. Liman

/s/ JOSEPH J. ACKELL
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United States District Court

SOUTHERN DISTRICT OF NEW YORK

CHRIS-CRAFT INDUSTRIES, INC.,
Plaintiff,
—against—
PIPER AIRCRAFT CORPORATION, *et al.*,
Defendants.
} 69 Civ. 2227 : MP

ANSWER AND COUNTERCLAIM OF CERTAIN DEFENDANTS TO SECOND AMENDED COMPLAINT

Defendants Piper Aircraft Corporation (hereinafter referred to as "Piper") and Thomas F. Piper, William T. Piper, Jr. and Howard Piper, (hereinafter referred to as the "Piper defendants"), answering the second amended complaint herein:

FIRST DEFENSE TO COUNT ONE

1. Deny each and every allegation contained in paragraph 1 of the second amended complaint, except admit that plaintiff purports to bring this action under the statutes and rules therein cited.

2. Deny each and every allegation contained in paragraphs 2, 10, 11, 13, 15, 16, 17, 20, 21, 22, 23, 24, 25, 26, 27, 30, 32, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 49, 50, 51, 52 and 53 of the second amended complaint.

3. Admit the allegations contained in paragraphs 3, 4 and 8 of the second amended complaint.

4. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the second amended complaint, except admit that Chris-Craft Industries, Inc. ("Chris-Craft") owns some shares of Piper common stock.

Answer and Counterclaim of Piper Defendants To Second Amended Complaint

5. Deny each and every allegation contained in the last sentence of paragraph 6(a) of the second amended complaint. Admit the allegations contained in the first three sentences of paragraph 6(a) and paragraphs 6(b) and 6(c) of the second amended complaint.

6. Admit the allegations contained in the first two sentences of paragraph 7 of the second amended complaint. Deny each and every allegation contained in the third sentence of paragraph 7 of the second amended complaint.

7. Deny each and every allegation contained in paragraph 9 of the second amended complaint, except admit that on or about January 23, 1969, Chris-Craft, for the first time, publicly announced that it had acquired shares of Piper common stock and proposed making a tender offer for 300,000 shares of Piper common stock at $65 per share, with a view to control of Piper, and that the closing price of the Piper common shares on the New York Stock Exchange on January 22, 1969 was $52.50 per share.

8. Deny each and every allegation contained in paragraph 12 of the second amended complaint, except admit that on or about January 24, 1969, Chris-Craft made a tender offer to shareholders of Piper for 300,000 shares of Piper common stock at $65 per share, and that Piper sent letters to its shareholders dated January 27 and January 28, 1969, and refer to those letters for the full contents thereof.

9. Deny each and every allegation contained in the first sentence of paragraph 14 of the second amended complaint. Admit the second sentence of paragraph 14 of the second amended complaint.

10. Deny each and every allegation contained in paragraph 18 of the second amended complaint, except admit

that the agreement between Piper and Grumman Aircraft Engineering Corporation was terminated by mutual consent on or about March 18, 1969.

11. Deny each and every allegation contained in paragraph 19 of the second amended complaint, except admit that on February 27, 1969, Chris-Craft filed a Form S-1 with the Securities and Exchange Commission by which Chris-Craft proposed to offer to exchange unspecified amounts of certain of its securities for shares of Piper common stock, and refer to the Form S-1 for the full terms and provisions thereof.

12. Deny each and every allegation contained in paragraph 28 of the second amended complaint, except admit that on or about March 31, 1969, Chris-Craft instituted an action against Piper, the Piper defendants and others in the Supreme Court of the State of New York, County of New York and refer to the pleadings and order therein for the full contents thereof.

13. Deny each and every allegation contained in paragraph 29 of the second amended complaint, except admit that trading in Piper common stock was suspended on the New York Stock Exchange commencing April 7, 1969.

14. Deny each and every allegation contained in paragraph 31 of the second amended complaint, except admit that the transactions with South Ply and U. S. Concrete Pipe Company of Florida were rescinded on April 14, 1969 and that the suspension of trading in Piper common stock was terminated effective April 21, 1969.

15. Deny each and every allegation contained in paragraph 33 of the second amended complaint, except admit that on or about May 7, 1969, Chris-Craft announced that it

had filed an amendment to the S-1 previously filed with the Securities and Exchange Commission and refer to such announcement and amendment for the full terms and conditions of the exchange offer referred to.

16. Deny each and every allegation contained in paragraph 35 of the second amended complaint, except admit that on May 8, 1969, Piper and Bangor Punta issued press releases and refer to such releases for the full contents thereof.

17. Deny each and every allegation contained in paragraph 46 of the second amended complaint, except admit that prospectuses were prepared by Bangor Punta and information on Piper was supplied by Piper and that First Boston was designated in the prospectuses as "dealer-manager".

18. Deny each and every allegation contained in paragraph 48 of the second amended complaint except admit that the final prospectus was filed and refer to such prospectus for the full terms and provisions thereof.

FIRST DEFENSE TO COUNT TWO

19. Repeat the admissions and denials herein with respect to paragraphs 1 through 7, 35, 38 and 48 through 51 of the second amended complaint as though set forth herein at length.

20. Deny each and every allegation contained in paragraphs 55 and 56 of the second amended complaint.

FIRST DEFENSE TO COUNT THREE

21. Repeat the admissions and denials herein with respect to paragraphs 1 through 53 of the second amended complaint as though set forth herein at length.

22. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 58 and 59 of the second amended complaint.

23. Deny each and every allegation contained in paragraphs 60 and 61 of the second amended complaint.

SECOND DEFENSE TO ALL COUNTS

24. Deny each and every allegation contained in paragraphs 62, 63, 64, 65 and 66 of the second amended complaint.

THIRD DEFENSE TO ALL COUNTS

25. The allegations of the second amended complaint fail to state a claim or claims against Piper or the Piper defendants upon which relief can be granted.

FIRST AFFIRMATIVE DEFENSE

26. By reason of the wrongful and unlawful conduct of Chris-Craft hereafter set forth, Chris-Craft enters this court with unclean hands and is barred from any relief demanded in the second amended complaint.

SECOND AFFIRMATIVE DEFENSE

27. After Chris-Craft announced the aforementioned cash tender offer in January 1969, Piper became aware of the prior corporate history of Chris-Craft and its management and, acting in the best interests of all the Piper shareholders, decided that the acquisition of control of Piper by Chris-Craft would not be in the best interests of the Piper shareholders. Piper therefore undertook to oppose Chris-Craft's attempts to acquire control of Piper, the Piper defendants rejected Chris-Craft's offers to them of personal

advantage in exchange for co-operation with Chris-Craft's take over attempt, and Piper searched for corporate opportunities which would promote the interests of all Piper shareholders.

THIRD AFFIRMATIVE DEFENSE

28. Chris-Craft is estopped from recovering herein as it failed to take appropriate steps to mitigate its alleged damages.

COUNTERCLAIM

29. Beginning at least as early as October 1968 Chris-Craft its officers and directors and its financial advisors have undertaken and engaged upon an unlawful conspiracy, plan and scheme in contravention of the federal securities laws and other applicable federal statutes and regulations, including Sections 5, 10, 12 and 17 of the Securities Act of 1933 (15 U.S.C. § 77(a) *et seq.*) ("the 1933 Act"), Sections 7, 9, 10, 13 and 14 of the Securities Exchange Act of 1934 (15 U.S.C. § 78(a) *et seq.*) ("the 1934 Act") and Sections 3, 7, and 17 of the Investment Company Act of 1940 (15 U.S.C. § 80 a-1 *et seq.*) ("the 1940 Act") and the rules promulgated thereunder with respect to each such act. The purpose of such unlawful conspiracy, plan and scheme was to acquire control of Piper and to merge or otherwise consolidate Chris-Craft and Piper in a manner favorable to Chris-Craft and contrary to the best interests of Piper and its shareholders.

30. This counterclaim is asserted pursuant to Rule 13 of the Federal Rules of Civil Procedure.

31. Jurisdiction of this court is based on Section 22 of the 1933 Act, Section 27 of the 1934 Act and Section 43 of the 1940 Act. The acts and transactions complained of herein occurred, in whole or in part, within the Southern District of New York.

32. Pursuant to the aforementioned conspiracy, plan and scheme, Chris-Craft has undertaken the following overt acts, among others:

(a) Secretly acquired shares of Piper common stock from a registered investment company in a negotiated transaction without prior approval of the SEC in violation of Section 17 of the 1940 Act;

(b) Disclosed the aforementioned conspiracy, plan and scheme, together with other confidential information to representatives of the registered investment company, without making similar disclosure to the public; and

(c) Failed to fully and publicly disclose in press releases, in public documents filed with the SEC, in its December 1968 Debenture prospectus, or in its January 1969 tender offer its true intentions with respect to Piper, its lack of financial ability to undertake the acquisition of Piper, its intention to elect persons previously selected by it as directors of Piper, and other material facts.

CHRIS-CRAFT'S ACQUISITION OF
STOCK PRIOR TO ITS TENDER OFFER

33. Commencing on or about December 30, 1968 and ending prior to January 23, 1969, Chris-Craft acquired about 99,400 shares of Piper's common stock in the open market by purchases on the New York Stock Exchange. These securities were purchased through a secret numbered brokerage account at Mitchell Hutchins & Co. which was established at least as early as November 1968 for the express purpose of purchasing Piper stock.

34. On January 23, 1969, Chris-Craft in a negotiated transaction purchased 101,100 shares of Piper's common

stock from Technology Fund, Inc., an investment company registered under the 1940 Act. Chris-Craft did not, prior to purchasing Piper's stock from the registered investment company, seek or obtain the order of the SEC required by the 1940 Act exempting from the Act Chris-Craft's aforesaid purchase.

CHRIS-CRAFT'S SCHEDULE 13D FILING
WITH THE COMMISSION AND PIPER
PRIOR TO THE TENDER OFFER

35. On January 23, 1969 Chris-Craft filed with the SEC a document entitled "Schedule 13D—Information To Be Included in Statements Filed Pursuant to Rule 13d-1 or 14d-1", dated January 22, 1969 (hereinafter "Schedule"). That Schedule, together with subsequent amendments thereto, was materially deficient in the following respects:

(a) Item 3 of the Schedule, entitled "Source and Amount of Funds or Other Consideration", was false and misleading and omitted material facts concerning (1) the specific source of the funds used by Chris-Craft to acquire the shares of Piper stock, (2) the amount of the proceeds of Chris-Craft's December 1968 public offering used for such acquisitions, (3) the amount of bank and other credit used for such acquisitions, (4) the amount of the proceeds from the aforementioned public offering available to pay for tendered shares and (5) the amount Chris-Craft expected, or would have, to borrow to finance its purchase of tendered shares, and the terms and conditions of such proposed borrowings;

(b) Item 4 of the Schedule, entitled "Purpose of Transaction", was false and misleading and failed to describe Chris-Craft's proposed steps and purpose to effectuate its aforementioned overall plan with respect to Piper: and

(c) Item 5 of the Schedule, entitled "Interest in Securities of the Issuer", was false and misleading and failed to disclose that Chris-Craft purchased shares of Piper's stock from an "institutional investor" in a negotiated transaction at a time when Chris-Craft was an affiliated person of that investor. Chris-Craft also failed to disclose that prior SEC approval of that transaction was required under the 1940 Act.

CHRIS-CRAFT'S PRESS RELEASE

36. On January 23, 1969 Chris-Craft issued a press release which announced its "Offer to Purchase" up to 300,000 shares of Piper's common stock at $65 per share. The release was designed to, and did solicit proxies in support of Chris-Craft's unlawful plan. The release constituted a solicitation of proxies without appropriate compliance with the filing and disclosure requirements of the SEC's proxy rules.

CHRIS-CRAFT'S TENDER OFFER

37. On January 24, 1969 and on numerous dates thereafter Chris-Craft caused to be published in newspapers of wide general circulation and transported by the mails and interstate commerce, an "Offer to Purchase" up to, and possibly more than, 300,000 shares of Piper's common stock, at a price of $65 per share.

38. The "Offer to Purchase" required transmittal of an irrevocable proxy with the tendered shares and constituted an overt solicitation by Chris-Craft of proxies without compliance with the proxy rules of the SEC.

39. The "Offer to Purchase" further stated that

> "Chris-Craft is purchasing the Piper shares for investment with a view to control of Piper, but it does not presently have any specific plan or proposal to liquidate Piper, to acquire control of Piper, to sell its assets or to merge with any other companies or to make any other major change in its business or corporate structure. If this Offer is successfully completed, Chris-Craft will give consideration to some form of combination between it and Piper."

That statement was false and misleading and omitted to disclose the material fact that Chris-Craft did have a specific plan and was implementing it in attempting to elect its nominees as directors at Piper's 1969 annual meeting in order to acquire control of Piper and to combine with it.

40. As a result of the proxy solicitation contained in the "Offer to Purchase", Chris-Craft obtained purported proxies covering more than 300,000 shares and voted the same at Piper's 1969 annual meeting in violation of Rule 14a-4 of the SEC's proxy rules.

CHRIS-CRAFT'S LETTER OF JANUARY 28, 1969

41. Commencing on or about December 30, 1968 and continuing to February 3, 1969, Chris-Craft acquired approximately 140,000 shares of Piper's common stock in the open market. Chris-Craft intentionally did not demand or request from the sellers of such shares, at the time of acquiring them, either as part of its contract or otherwise, the execution of proxies by the shareholders of record on January 3, 1969 to vote such shares at Piper's 1969 annual meeting.

42. On January 28, 1969 Chris-Craft addressed letters to the shareholders of record of such shares. Such letters were false and fraudulent in that they stated that Chris-Craft, rather than the sellers of such shares, should be entitled to vote them at Piper's 1969 annual meeting, that

the New York Business Corporation Law imposed a duty on the record holder of shares to issue to Chris-Craft, upon demand, a proxy to vote such shares and that Chris-Craft was entitled to make such a demand, despite the fact that Piper is a Pennsylvania corporation and not subject to the New York Business Corporation Law.

43. The aforesaid letters were calculated to result and did result in the procurement by Chris-Craft, from the shareholders of record who received such letters, the execution of proxies which Chris-Craft voted in favor of its nominees for directors at Piper's 1969 annual meeting.

CHRIS-CRAFT'S EXCHANGE OFFERS

44. On February 27, 1969, in furtherance of the aforementioned conspiracy, plan and scheme, Chris-Craft filed a Registration Statement and form of Prospectus, Form S-1 with the SEC. The S-1 was subsequently amended and became effective on May 15, 1969. Thereafter Chris-Craft filed a second Registration Statement and form of Prospectus which prospectus became effective July 24, 1969.

45. The said Registration Statements and Prospectuses were false, misleading and deficient in many material respects and failed to disclose material facts, including, among others, the following:

(a) The actual earnings of Chris-Craft on a per share basis;

(b) The accurate pro forma financial information with respect to Piper and Chris-Craft;

(c) The source of the funds utilized by Chris-Craft to acquire shares of Piper common stock and the terms and conditions of the loan or loans made by Chris-Craft to obtain such funds;

(d) The prior corporate history of Chris-Craft and its management to the extent hereafter set forth;

(e) The absence of any study by Chris-Craft of the aircraft manufacturing industry, including Piper's role and position therein and its capital requirements;

(f) The inability of Chris-Craft to manage and operate Piper's business without qualified personnel experienced in the design, manufacture, sale and distribution of general aviation aircraft;

(g) The fact that Chris-Craft's offer to exchange Chris-Craft securities for Piper common stock would, if less than majority control is acquired, result in Chris-Craft becoming an investment company within the meaning of Section 3(a) of the Investment Company Act of 1940 and subject to all the restrictions therein and that the exchange offer constitutes a violation of Section 7 of said Act;

(h) The fact that in February 1969, Chris-Craft borrowed the sum of $15,000,000 from a national bank under circumstances which constituted a violation of Regulation U of the Board of Governors of the Federal Reserve System issued pursuant to Section 7(d) of the Securities Exchange Act of 1934;

(i) The lack of any plan for the repayment by Chris-Craft of such $15,000,000 loan, which repayment can be compelled upon demand by the bank;

(j) The fact that Chris-Craft, prior to the effective date of its exchange offer, intended to bring, and thereafter during the pendency thereof, did bring, an action against Piper and others demanding damages in the sum of $45,000,000, which action places Chris-Craft directors, who also purport to act as directors of Piper,

in a conflict of interest which requires them to resign as directors of Piper;

(k) The fact that the merger of Chris-Craft and Baldwin-Montrose Chemical Co. consummated in the spring of 1968 was in violation of the federal securities laws;

(l) The fact that Chris-Craft had decided to sell its industrial division for 19 million dollars;

(m) The fact that during the period beginning February 27, 1969 and continuing until at least April 7, 1969, Chris-Craft, in violation of Rule 10b-6, unlawfully continued to solicit the purchase of shares of Piper common stock until compelled to desist by the SEC;

(n) The fact that Chris-Craft as presently constituted, is the result of numerous mergers with viable corporations, the business of many of which is no longer being carried on by Chris-Craft;

(o) The fact that after the merger with, or acquisition of, such viable corporations, Chris-Craft's management disposed of the productive business and assets of such other corporations, and that such disposition was frequently at a loss as, for example, occurred in the case of Baldwin Rubber Company and General Artists Corporation;

(p) The fact that the purchasers of the productive business and assets of the merged or acquired corporations, in some instances, were financed by officers of Chris-Craft or the corporation itself as, for example, occurred in the case of Centlivre Brewing Co. and General Artists Corporation;

(q) The fact that Chris-Craft's management frequently used the assets of Chris-Craft to acquire stock interests in other corporations after which Chris-

Craft's officers and directors became directors of such other corporation but, upon meeting resistance to a take over of such other corporation, disposed of the stock at a profit, as occurred, for example, in the case of Paramount Pictures Corporation;

(r) The fact that the history of the management of Chris-Craft has been one of utilizing the assets of Chris-Craft and its predecessor corporations for their self-aggrandisement in a manner inconsistent with the best interests of the stockholders of such corporations; and

(s) The fact that Chris-Craft's management is actually dominated and controlled by three officers who make all decisions for the corporations as though it were their own private proprietorship without prior consultation or consideration by the Board of Directors as, for example, occurred when said officers decided to invest over $35,000,000 of the corporation's capital in Piper stock without prior approval by the Board of Directors.

MARKET MANIPULATION

46. As a further part of Chris-Craft's plan and scheme to take over control of Piper, Chris-Craft engaged in manipulative and deceptive practices designed to tie up shares of Piper stock and to create active trading in Chris-Craft securities in order to make its offers appear more attractive. Pursuant to such plan and scheme Chris-Craft:

(a) Disclosed to certain large investors that it intended to take over Piper;

(b) Advised certain brokerage houses of its intention to take over Piper and arranged to have them contact large investors and persuade such investors to purchase shares of Chris-Craft. Such investors did, in fact, purchase Chris-Craft shares on the New York

Stock Exchange in many small transactions resulting in a substantial increase in the price of Chris-Craft's stock creating the impression of market strength.

CHRIS-CRAFT'S UNLAWFUL FINANCING

47. Commencing in October, 1968 in furtherance of its aforementioned plan Chris-Craft made arrangements to borrow approximately $15,000,000 in transactions from a bank or group of banks as defined in Section 3(a) of the 1934 Act and Section 3(K) of Regulation U (12 CFR § 221.1 *et seq.*) issued pursuant to Section 7(d) of the 1934 Act. These arrangements culminated in a loan to Chris-Craft in February, 1969 which loan was "purpose credit" secured directly or indirectly by stock as defined by Regulation U. The amount of the loan was in excess of the maximum loan value permitted by Regulation U and in violation of said Regulation. The lending bank or banks knew that the loan was to be used to purchase Piper stock and that it was unlawful.

48. Pursuant to the aforementioned conspiracy, plan and scheme, Chris-Craft has instituted numerous actions and proceedings for the purpose of publicly announcing the substance of the allegations therein in order to thwart the efforts of Piper to protect the interests of Piper shareholders by resisting Chris-Craft's take over attempts and for the purpose of depressing and manipulating the market price of the Piper common stock in order to enable Chris-Craft to take over Piper on terms more favorable to Chris-Craft than to the Piper shareholders.

WHEREFORE, Piper and the Piper defendants demand judgment:

1. Dismissing the second amended complaint together with costs and disbursements of this action.

2. Requiring Chris-Craft to divest in whatever manner the Court may deem proper all shares of Piper stock acquired by it in violation of the securities laws, including (a) the approximately 101,000 shares acquired from Technology Fund, (b) the approximately 304,600 shares acquired pursuant to its cash tender offer, (c) the approximately 9,100 shares acquired in the open market prior to April 7, 1969, (d) all shares purchased with the proceeds of the sale of its convertible subordinated debentures and its unlawful bank loan and (e) all shares acquired under its false and misleading exchange offer.

3. Enjoining and restraining Chris-Craft and all persons acting on its behalf from voting all shares of Piper acquired by it in violation of the securities laws, as long as such shares are held directly or indirectly by Chris-Craft.

4. Awarding such damages resulting from the conduct complained of in the counterclaim as may be found and determined by the court.

5. Granting such other and further relief as the court may deem just and proper.

Dated: New York, New York
September 1, 1970

CHADBOURNE, PARKE, WHITESIDE & WOLFF

By ZACHARY SHIMER
A Member of the Firm

Attorneys for Defendants Piper Aircraft Corporation, Thomas F. Piper, William T. Piper, Jr. and Howard Piper
25 Broadway
New York, New York 10004
Telephone No. 344-8900

United States District Court

SOUTHERN DISTRICT OF NEW YORK

CHRIS-CRAFT INDUSTRIES, INC.,
Plaintiff,
—against—
PIPER AIRCRAFT CORPORATION, *et al.*,
Defendants.

68 Civ 2227 : MP

ANSWER TO SECOND AMENDED COMPLAINT

Defendants The First Boston Corporation, Paul L. Miller and N. Bayard, by their attorneys Sullivan & Cromwell, for their answer to the second amended complaint:

FIRST DEFENSE TO COUNT ONE

1. Deny each and every allegation contained in paragraph 1 of the second amended complaint, except admit that plaintiff purports to bring this action under the statutes and rules therein cited.

2. Deny each and every allegation contained in paragraphs 2, 10, 11, 13, 16, 17, 20, 21, 22, 24, 25, 26, 27, 30, 34, 36, 37, 38, 45, 47, 49 and 51 of the second amended complaint.

3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 32, 39, 41, 42, 43, and 44 of the second amended complaint.

4. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the second amended complaint, except admit that Chris-Craft Industries, Inc. ("Chris-Craft") owns shares of Piper Aircraft Corporation ("Piper") common stock.

Answer of First Boston Defendants to Second Amended Complaint

5. Deny each and every allegation contained in paragraph 6(a) of the second amended complaint, except admit that defendant Bangor Punta Corporation ("Bangor Punta"), a Delaware corporation, is publicly held, and that its common and preferred stock trade on the NYSE.

6. Deny each and every allegation contained in paragraph 7 of the amended complaint, except admit that defendant The First Boston Corporation ("First Boston") is a corporation doing business in the City, County and State of New York engaged in, among other things, investment banking, and that Paul L. Miller is the President and N. Bayard a Vice President thereof.

7. Deny each and every allegation contained in paragraph 9 of the second amended complaint, except admit that Chris-Craft made a public announcement on January 23, 1969, and refer to the announcement for the terms thereof, and further admit that the closing price of the Piper common shares on the New York Stock Exchange on January 22, 1969 was $52.50 per share.

8. Deny each and every allegation contained in paragraph 12 of the second amended complaint, except admit that on or about January 24, 1969, Chris-Craft made a tender offer to shareholders of Piper stock, and that Piper sent letters to its shareholders dated January 27 and January 28, 1969, and refer to such offer and letters for the full contents thereof.

9. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14 of the second amended complaint, except admit that Piper issued an announcement on January 29, 1969, and refer to the text of the announcement for the contents thereof.

10. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 15 of the second amended complaint, except deny that First Boston knew that the 300,000 shares to be issued to Grumman could not be listed on the NYSE, admit that the agreement between Piper and Grumman contained provisions with regard to the stock and proceeds, and refer to the text of the agreement for the terms thereof.

11. Deny each and every allegation contained in paragraph 18 of the second amended complaint, except admit that the agreement between Piper and Grumman Aircraft Corporation was terminated by mutual consent on or about March 18, 1969.

12. Deny each and every allegation contained in paragraph 19 of the second amended complaint, except admit that on February 27, 1969, Chris-Craft filed a registration statement with the Securities and Exchange Commission regarding a proposed exchange offer, and refer to the registration statement for the terms of the proposed offer.

13. Deny each and every allegation contained in paragraph 23 of the second amended complaint, except admit that Pittsburgh Coke issued a report to the shareholders on or about March 21, 1969, and refer to the report for the contents thereof.

14. Deny each and every allegation contained in paragraph 28 of the second amended complaint, except admit that on or about March 31, 1969, Chris-Craft instituted an action against Piper, the Piper defendants and others in the Supreme Court of the State of New York, County of New York and refer to the pleadings and order therein for the full contents thereof.

15. Deny each and every allegation contained in paragraph 29 of the second amended complaint, except admit

that trading in Piper common stock was suspended on the New York Stock Exchange commencing April 7, 1969.

16. Deny each and every allegation contained in paragraph 31 of the second amended complaint, except admit that the transactions with South Ply and U.S. Concrete Pipe Company of Florida were rescinded on April 14, 1969 and that the suspension of trading in Piper common stock was terminated effective April 21, 1969.

17. Deny each and every allegation contained in paragraph 33 of the second amended complaint, except admit that on or about May 7, 1969, Chris-Craft announced that it had filed an amendment to the S-1 previously filed with the Securities and Exchange Commission and refer to such announcement and amendment for the full terms and conditions of the exchange offer referred to.

18. Deny each and every allegation contained in paragraph 35 of the second amended complaint, except admit that on May 8, 1969, Piper and Bangor Punta issued press releases and refer to the text of said releases for the matters contained therein.

19. Deny each and every allegation contained in paragraph 40 of the second amended complaint, except deny knowledge or information sufficient to form an opinion as to the truth of the allegations with regard to the other defendants.

20. Deny each and every allegation contained in paragraph 46 of the second amended complaint, except admit that prospectuses were prepared by Bangor Punta, that information on Piper was supplied by Piper, and that First Boston was designated in the prospectuses as "dealer-manager," and deny knowledge or information sufficient to form a belief as to whether the information on Piper was supplied by Management Directors.

Answer of First Boston Defendants to Second Amended Complaint

21. Deny each and every allegation contained in paragraph 48 of the second amended complaint, except admit that the final prospectus was filed and refer to such prospectus for the full terms and provisions thereof.

22. Deny knowledge or information sufficient to form an opinion as to the truth of the allegations contained in paragraph 50 of the second amended complaint, except aver that the package of Bangor Punta securities had a value of at least $80 a share on the effective date of the Bangor Punta exchange offer.

23. Deny knowledge or information sufficient to form an opinion as to the truth of the allegations contained in paragraphs 52 and 53 of the second amended complaint, except admit that after the expiration of its exchange offer and subsequent to August 8, 1969, Bangor Punta purchased additional shares of Piper stock for cash.

FIRST DEFENSE TO COUNT TWO

24. Repeat the admissions and denials herein with respect to paragraphs 1 through 7, 35, 38 and 48 through 51 of the second amended complaint as though set forth herein at length.

25. Deny each and every allegation contained in paragraphs 55 and 56 of the second amended complaint.

FIRST DEFENSE TO COUNT THREE

26. Repeat the admissions and denials herein with respect to paragraphs 1 through 53 of the second amended complaint as though set forth at length herein.

27. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 58, 59, 60 and 61 of the second amended complaint.

Answer of First Boston Defendants to Second Amended Complaint

FIRST DEFENSE TO ALL COUNTS

28. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 62 of the second amended complaint.

29. Deny each and every allegation contained in paragraphs 63, 64, 65 and 66 of the second amended complaint.

FIRST AFFIRMATIVE DEFENSE TO ALL COUNTS

30. The amended complaint fails to state a claim on which relief can be granted against The First Boston Corporation, Paul L. Miller, or N. Bayard.

SECOND AFFIRMATIVE DEFENSE TO ALL COUNTS

31. Plaintiff enters this Court with unclean hands and is therefore barred from obtaining any relief under the second amended complaint, because in connection with its acquisition of Piper stock and its proposed exchange offers:

(a) It purchased Piper stock with the proceeds of a loan or loans obtained in violation of Regulation U of the Board of Governors of the Federal Reserve System;

(b) It purchased Piper stock from a registered investment company in a negotiated transaction without prior approval of the Securities and Exchange Commission in violation of Section 17 of the Investment Company Act of 1940;

(c) It purchased Piper stock in violation of Rule 10b-6 of the Securities and Exchange Commission;

(d) It filed with the Securities and Exchange Commission, in connection with its tender offer of Janu-

ary 23, 1969, a Schedule 13(d) which was false, fraudulent and misleading;

(e) It filed with the Securities and Exchange Commission a registration statement and prospectus which became effective on May 15, 1969, and a second registration statement and prospectus which became effective on July 24, 1969, which in the form they became effective were false, fraudulent and misleading, in violation of the Securities Act of 1933 and the Securities Exchange Act of 1934.

WHEREFORE, defendants The First Boston Corporation, Paul L. Miller and N. Bayard demand judgment:

A. Dismissing the amended complaint and awarding them the costs and disbursements of this action, and

B. Granting such other and further relief as may be just.

Dated: New York, New York
September 15, 1970

SULLIVAN & CROMWELL

By JOHN F. ARNING
(A Member of the Firm)

Attorneys for defendants
The First Boston Corporation,
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HAnover 2-8100

United States District Court

SOUTHERN DISTRICT OF NEW YORK

CHRIS-CRAFT INDUSTRIES, INC.,
Plaintiff,
—against—
PIPER AIRCRAFT CORPORATION, *et. al.,*
Defendants.
} 69 Civ. 2227 : MP

REPLY TO COUNTERCLAIM

Plaintiff Chris-Craft Industries, Inc. ("Chris-Craft") by its attorneys, for its reply to the counterclaim of defendants Piper Aircraft Corporation ("Piper") and Thomas F. Piper, William T. Piper, Jr. and Howard Piper (the "Piper defendants"):

1. Denies each and every allegation contained in paragraphs 29, 32, 45, 46, 47 and 48.

2. Denies that it has knowledge and information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs 30 and 31, except admits that the Piper defendants purport to assert their counterclaim pursuant to Rule 13 of the Federal Rules of Civil Procedure, and that the Piper defendants purport to base jurisdiction on certain provisions of federal law.

3. Denies each and every allegation contained in paragraph 33, except admits that from December 30, 1968 to January 23, 1969 Chris-Craft purchased shares of Piper common stock through a member in good standing of the New York Stock Exchange ("NYSE"), which member in accordance with its own practices and not at the suggestion of Chris-Craft assigned Account No. 100 to such account. In further answer, Chris-Craft alleges that substantially less than 98,600 shares of Piper common stock, and less than 5% of the outstanding shares of Piper stock, had been delivered

to Chris-Craft's custody and control by January 22, 1969, and Chris-Craft did not have the power to vote 5% of Piper's stock on January 22, 1969.

4. Answering paragraph 34 of the complaint, Chris-Craft admits that on or about January 23, 1969, pursuant to a written agreement, Chris-Craft purchased 101,000 shares of Piper stock from Technology Fund, Inc., an investment company, and that no exemption was sought or obtained, or required to be obtained, from the Securities and Exchange Commission ("SEC") in connection with said purchase, and, except as so admitted, denies each and every allegation of said paragraph.

5. Denies each and every allegation contained in paragraph 35, except admits that it filed a Schedule 13-D with the SEC on January 23, 1969, and refers to said schedule for the terms thereof.

6. Denies each and every allegation contained in paragraph 36, except admits that on January 23, 1969 Chris-Craft published the announcement of its cash tender offer for up to 300,000 shares of Piper common stock with the right to purchase additional shares at $65 a share (the "tender offer").

7. Admits the allegations contained in paragraph 37.

8. Denies each and every allegation contained in paragraph 38 of the complaint and refers to Chris-Craft's tender offer for the terms thereof.

9. Denies each and every allegation contained in paragraph 39, except admits that the tender offer included the statement quoted in said paragraph, and refers to the tender offer for all of the terms thereof.

10. Denies each and every allegation contained in paragraph 40, except admits that Chris-Craft voted valid proxies

covering more than 300,000 Piper shares at Piper's 1969 annual shareholders meeting.

11. Denies each and every allegation contained in paragraph 41, except admits that Chris-Craft acquired shares of Piper common stock in the open market between December 30, 1968.

12. Denies each and every allegation contained in paragraph 42, except admits that Chris-Craft sent its letter dated January 28, 1969 to the shareholders of Piper, and refers to said letter for the contents thereof.

13. Denies each and every allegation contained in paragraph 43, except admits that Chris-Craft received and voted proxies from Piper shareholders.

14. Denies each and every allegation contained in paragraph 44, except admits that Chris-Craft made a single offering to the shareholders of Piper by its registration statement and preliminary prospectus filed with the SEC on February 27, 1969, and by a second registration statement and form of prospectus which became effective on July 24, 1969, for its registered exchange offer of Chris-Craft securities for shares of Piper stock.

WHEREFORE, Chris-Craft demands judgment herein on its complaint and dismissing the counterclaim of said defendants, together with the costs and disbursements of this action.

Dated: New York, New York
September 24, 1970

PAUL, WEISS, GOLDBERG, RIFKIND,
WHARTON & GARRISON

By A. L. LIMAN
Attorneys for Plaintiff
345 Park Avenue
New York, New York 10022
(212) 935-8000

Answer of Bangor Punta Corporation, David W. Wallace and Nicolas Salgo, Defendants in *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corporation, et al.*, 69 Civil 2227 MP

Upon oral stipulation with Chris-Craft Industries, Inc. and with the approval of the District Court, Bangor Punta Corporation, David W. Wallace and Nicolas Salgo ("defendants") did not file an Answer to the Second Amended Complaint of Chris-Craft Industries, Inc., and it was agreed that defendants' answer consisted of a general denial of all material allegations, except that jurisdiction over both the parties and the causes of action was admitted, and the following affirmative defenses: (1) failure to state a claim upon which relief can be granted, (2) lack of capacity to maintain the action and (3) unclean hands and *in pari delicto*, based upon the allegations contained in the Amended Complaint in *Bangor Punta Corporation* v. *Chris-Craft Industries, Inc., et al.*, 69 Civil 2354:MP (*infra.*, pp. F-55 et seq.)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

BANGOR PUNTA CORPORATION,

Plaintiff,

—against—

CHRIS-CRAFT INDUSTRIES, INC., LOEB, RHOADES & CO., SHIELDS & COMPANY, INCORPORATED, HERBERT J. SIEGEL, ALFRED L. HOLLENDER, JAMES J. ROCHLIS, HARRY H. COLL, JOHN HOPKINS, C. LEONARD GORDON, LAWRENCE R. BARNETT, VICTOR ORISTANO, WINSLOW MAXWELL, ROBERT B. HUNTER, BERNARD ART, ARMAND G. ERPF, LOUIS C. GOAD, DAVID F. LINOWES, ALVIN R. ROZELLE, and H. V. SHERRILL,

Defendants.

69 Civ. 2354

FIRST AMENDED COMPLAINT

Plaintiff, by its attorneys, Webster Sheffield Fleischmann Hitchcock & Brookfield, complaining of the defendants alleges on information and belief except as to the allegations in paragraphs 1 and 2 herein the following:

JURISDICTION

1. This Court has jurisdiction of this action pursuant to Section 22 of the Securities Act of 1933 (15 U.S.C. § 77v), Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. § 72aa), Section 44 of the Investment Company Act of 1940 (15 U.S.C. § 80a-43), and pendant jurisdiction, and the matters in controversy involve a claim of damages in excess of Ten Thousand Dollars ($10,000) exclusive of costs.

THE PARTIES

2. Plaintiff, BANGOR PUNTA CORPORATION ("Bangor Punta"), is a Delaware corporation with its principal place of business at One Greenwich Plaza, Greenwich, Connecticut, engaged in diverse manufacturing and service businesses with annual sales in excess of $250,000,000 a year. Bangor Punta's securities are listed and traded on the New York Stock Exchange and American Stock Exchange and are owned by more than 15,000 holders.

3. Defendant, CHRIS-CRAFT INDUSTRIES, INC. ("Chris-Craft") is a Delaware corporation with its principal place of business at 600 Madison Avenue, New York, New York. Chris-Craft's securities are listed and traded on the New York Stock Exchange and Pacific Stock Exchange.

4. Defendant Herbert J. Siegel is and at all relevant times was, President and chief executive officer, a director and a controlling person of Chris-Craft. The other individual defendants named herein are, and were at all relevant times, directors, and in some instances, also officers of Chris-Craft.

5. Defendant LOEB, RHOADES & Co. ("Loeb, Rhoades") is a partnership with its principal place of business at 42 Wall Street, New York, New York.

6. Defendant SHIELDS & COMPANY, INCORPORATED ("Shields") is a corporation with its principal place of business at 44 Wall Street, New York, New York.

THE FACTS

7. PIPER AIRCRAFT CORPORATION ("Piper") is a Pennsylvania corporation with its principal place of business in Lock Haven, Pennsylvania and is recognized as one of the

leading manufacturers of light private aircraft in the United States with annual sales in excess of $97,000,000. At all relevant times, except during the period April 7, 1969 through April 18, 1969, Piper's securities were listed and traded on the New York Stock Exchange.

8. On or about December 30, 1968, there were issued and outstanding approximately 1,641,890 shares of Piper common stock of which 501,090 shares were owned beneficially, or as of record, by the late William T. Piper, Sr., one of the founders of Piper, members of his family and certain oragnizations controlled by them (hereinafter sometimes referred to collectively as the "Piper family"). The principal officers and directors of Piper at that time were members of the Piper family. The balance of the issued and outstanding shares of Piper common stock was held by the public.

9. Chris-Craft is, and at all relevant times was, a so-called conglomerate controlled by the defendant Siegel and his close associates. The defendant Siegel had a reputation in the financial world of being a corporate raider and continually attempting to gain control of other corporations against their wishes and desires. Siegel and his associates made these attempts by means of various schemes, devices and tactics usually involving the acquisition of a significant block of stock of the "target" company, then after gaining a controlling interest in the target company, attempting to force a merger of the operations of such corporations into the operations of Chris-Craft. By following this program of "take over" attempts, the defendant Siegel caused Chris-Craft (formerly known as Baldwin-Montrose Chemical Corporation) to grow in a short period of time from being solely an independent manufacturer of chemicals and automobile floor mats with limited sales, to a conglomerate corporation with diverse and unrelated interests in boats and related craft, broadcasting, television, industrial and agri-

cultural chemicals, and the manufacture of fiber and foam products for the automotive, shoe and women's wear industries, with sales in excess of $90,000,000 in 1968.

10. In or prior to October, 1968, the defendants conceived and concocted a plan and scheme to seek to acquire control of Piper by purchasing or otherwise acquiring Piper common stock for cash or Chris-Craft securities, which plan will be more fully described hereinafter. The defendants planned to follow the same general pattern of previous takeover attempts by Chris-Craft and other companies controlled by defendant Siegel. Siegel and his close associates in Chris-Craft formulated the strategy for this takeover attempt. As will be more fully stated hereinafter, beginning in or at some time prior to October, 1968 and continuing through August 4, 1969, in its attempt to seize control of Piper, Chris-Craft was engaged in a distribution of its securities within the meaning of the Securities Act of 1933 as amended ("1933 Act"), the Securities Exchange Act of 1934 as amended (the "1934 Act"), and the Rules and Regulations of the Securities and Exchange Commission ("SEC") thereunder. The defendants deliberately and intentionally failed to comply fully with the disclosure and registration provisions of the 1933 Act and the 1934 Act but instead used various schemes and devices to conceal their unlawful activities.

11. As the initial step and in furtherance and consummation of its scheme and plan, in or about October, 1968, Chris-Craft caused to be prepared and filed with the SEC a registration statement on Form S-1 and a preliminary prospectus relating to a proposed offer to sell to its own shareholders by subscription, and to the public generally if necessary, a maximum of $26,000,000 principal amount of 6% convertible subordinated debentures in an underwriting managed by the defendants Loeb, Rhoades and Shields.

On December 10, 1968, such registration statement and the final prospectus was declared effective by the SEC. Between December 10, 1968 and December 30, 1968, $21,223,200 of convertible subordinated debentures were sold by Chris-Craft to its shareholders or to the general public through underwriters by means of a prospectus which stated:

> "Such funds [proceeds of debenture sales] will be available for use in connection with further acquisitions and diversification of the Company's business . . . There are, at the present time, no understandings or agreements (. . .) with respect to any proposed acquisitions and the Company can give no assurances that any such acquisitions will be effected . . . ."

Such statement was materially false and misleading at the time the prospectus was being distributed and used by its shareholders and the general public, as the defendants well knew, because at such time the defendants had already decided to attempt to seize control of Piper and had taken a number of steps in preparation to carry out their scheme in addition to raising funds by the sale of the convertible debentures.

12. In furtherance of the scheme and plan, Chris-Craft, the defendant Siegel and his close associates in or about December, 1968, entered into a conspiracy with certain stock brokerage firms, registered investment companies and other institutional investors, whereby such firms and individuals agreed to acquire or retain, or induce others to acquire or retain, Piper common stock then owned or subsequently acquired by them, and to sell such Piper common stock to Chris-Craft after it completed its offering of its convertible debentures to its shareholders and the public on December 30, 1968.

13. As part of the above-mentioned conspiracy in December, 1968, Chris-Craft and the defendant Siegel and his

close associates caused certain brokerage firms to search out blocks of Piper common stock for the purpose of inducing the holders thereof to sell such blocks on and after December 30, 1968. On or about December 15, 1968, Chris-Craft caused to be set up at a certain brokerage firm a secret account designated "Account No. 100" which secret account was used by Chris-Craft to conceal its transactions in Piper common stock.

14. Commencing on December 30, 1968, and continuing through January 23, 1969, Chris-Craft, using the secret Account No. 100, began acquiring shares of Piper common stock in a series of several large trades over the New York Stock Exchange, from a number of substantial institutional holders of Piper common stock. By January 22, 1969, Chris-Craft had acquired a total of 98,600 shares or approximately 6.01% of the outstanding shares of Piper common stock. All but 3,700 of such shares were held in secret Account No. 100. No shares were delivered to the transfer agent of Piper for a transfer of record to Chris-Craft, or its nominee until January 30, 1969 in order to conceal further the activities of Chris-Craft from Piper and the public.

15. Although the proposed takeover of Piper and Chris-Craft's acts taken in furtherance thereof were material developments, Chris-Craft made no public announcement thereof until January 23, 1969 and instead concealed its activities, although by January 15, 1969 information about the proposed takeover had been leaked to certain brokerage firms and substantial trading and speculation in the securities of Chris-Craft was being conducted by persons with such inside information.

16. Sometime in or about December, 1968, Chris-Craft caused a member of the conspiracy to contact the Technology Fund, Inc., an investment company as defined in Section 3 of the Investment Company Act of 1940 (the "1940 Act") and the holder of approximately 101,000 shares of approximately 6.16% of the outstanding shares of Piper common stock, and to induce Technology Fund to sell its Piper holdings to Chris-Craft. Technology Fund advised Chris-Craft it might be interested in selling its large block of Piper common stock, but only at a price substantially in excess of the then current market price for Piper common stock and not in a transaction over a national securities exchange. Thereafter on or about January 21, 1969, a representative of Technology Fund entered into secret negotiations with the defendants pursuant to which an agreement was reached on January 22, 1969, whereby Technology Fund agreed to sell and did sell its Piper shares to Chris-Craft, receiving a sales price of $65.00 per share for its Piper holdings which sales price was preferential and far in excess of the current market price of Piper common stock offered to or received by any public seller. On January 23, 1969, a written agreement between Technology Fund and Chris-Craft was entered into consummating the sale of Technology Fund's Piper holdings to Chris-Craft. As part of the same transaction, Technology Fund gave to Chris-Craft its proxy to vote the shares of Piper common stock registered in its name at the forthcoming annual meeting of Piper shareholders. Technology Fund further agreed to purchase Chris-Craft securities as more fully described in paragraph 18 hereof. At the time Chris-Craft effected these transactions, both Chris-Craft and Technology Fund were affiliates of Piper as that term is defined in Section 2 of the 1940 Act, as Chris-Craft well knew.

17. During and as part of the above-mentioned negotiations, Technology Fund was informed of the details of Chris-Craft's scheme and plan to obtain control of Piper by means of undisclosed purchases of Piper common stock, followed by a cash tender offer to be made on or about January 23, 1969, and then concluded by a registered exchange offer of Chris-Craft securities for sufficient Piper

common stock to assure domination and control of Piper by Chris-Craft.

18. As a further part of its scheme and plan to seize control of Piper, the defendants through members of their conspiracy disclosed to certain large investors Chris-Craft's program to take over Piper and requested such large investors to assist the defendants in establishing and maintaining a seemingly active market in Chris-Craft's securities over the New York Stock Exchange by purchasing large quantities of Chris-Craft's securities in small lots over a long period of time. Such investors, including Technology Fund, agreed to and did effect such purchases. As a result of these unlawful activities, the market prices of Chris-Craft's securities were artificially inflated and maintained from January 23, 1969 through August 4, 1969 and holders of Piper common stock were induced to tender their shares to Chris-Craft and later to accept its registered exchange offer rather than resist the takeover attempt of Chris-Craft.

19. Concurrently with the aforementioned secret market purchases, the negotiations with Technology Fund for its Piper holdings and unlawful market activity in Chris-Craft's securities transacted by others at the defendants' request, Chris-Craft began preparation for the next step in its scheme and plan to seize Piper, by ordering its attorneys to draft the necessary documents to make the cash tender offer to the public shareholders of Piper pursuant to Section 14(d) of the 1934 Act.

20. On January 23, 1969, in furtherance of its scheme and plan, Chris-Craft published the announcement of its cash tender offer for up to 300,000 shares of Piper common stock at a price of $65 per share in the public press and concurrently filed with the SEC a Schedule 13-D with regard to the tender offer pursuant to Sections 13(d) and 14(d) of the 1934 Act.

21. The public announcement and the Schedule 13-D filed by Chris-Craft with the SEC contained a number of material omissions and was deliberately misleading for the purpose of concealing the scope of the scheme and design of Chris-Craft to seize control of Piper, and failed to disclose that Chris-Craft intended to and did purchase 38,900 shares of Piper common stock on the New York Stock Exchange while its tender offer was pending.

22. In furtherance of its scheme and plan to acquire Piper, between January 23, 1969 and February 3, 1969 when Chris-Craft was soliciting tenders of the common stock of Piper, defendant Siegel advised numerous brokers that he was unable to tell them whether Chris-Craft would purchase more than 300,000 shares of Piper common stock pursuant to its tender offer if more than that number of shares were tendered. Such statements were made for the purpose of manipulating and did manipulate and depress the market price of Piper common stock on the New York Stock Exchange to a level substantially below the tender price of $65 so that Chris-Craft could continue to purchase shares of Piper on the open market at a lower price than the tender price. By means of such manipulation Chris-Craft purchased during such period approximately 38,900 shares of Piper common stock at artificially depressed prices.

23. Chris-Craft's cash tender offer expired on February 3, 1969; Chris-Craft purchased approximately 304,600 shares of Piper common stock pursuant to such tender offer.

24. In furtherance of its takeover scheme and plan, Chris-Craft attempted to secure representation on the Piper Board of Directors by obtaining proxies for the annual meeting, originally scheduled for February 4, 1969, with a record date of January 3, 1969. As part of these efforts, on or about January 28, 1969, Chris-Craft demanded proxies from those persons who had sold it large blocks of Piper

common stock in transactions occurring in January, 1969 by sending them letters containing false and misleading statements and omissions, including the false statement that Chris-Craft was entitled under the law to receive proxies therefor from the registered owners of such Piper common stock. At the Piper annual meeting, convened on February 4, 1969, Chris-Craft presented its proxies and the meeting was adjourned until the voting was finalized. At the reconvened meeting on March 25, 1969, defendants Rochlis and Gordon were elected to the Board of Directors of Piper.

25. In and about February, 1969, in furtherance of its scheme and plan, Chris-Craft borrowed the sum of approximately $15,000,000 in one or more transactions from a bank or banks, as defined in Section 3(a) of the 1934 Act and Section 3(k) of Regulation U issued by the Board of Governors of the Federal Reserve System pursuant to Section 7(d) of the 1934 Act ("Regulation U").

26. The above-mentioned Chris-Craft loan was, to the knowledge of the bank or banks, a credit obtained for the purpose of purchasing and carrying securities listed on a national exchange, to wit Piper common stock, and said credit was a "purpose credit" as that term is defined in Regulation U. Such loan was secured directly or indirectly, as such terms are defined in Regulation U, by the shares of Piper common stock purchased. The loan so extended to Chris-Craft was greater than the maximum loan value, as set by the Supplement to Section 4 of Regulation U, of the securities constituting collateral therefor, and consequently, the loan was illegal.

27. In the next step of its scheme and plan, on or about February 27, 1969, Chris-Craft filed with the SEC a Registration Statement on Form S-1 and preliminary prospectus relating to the defendants' planned registered exchange offer of Chris-Craft securities for Piper securities and distributed such preliminary prospectus to the public.

28. Commencing on or about March 18, 1969, Chris-Craft again began to purchase Piper common stock on the open market. Such purchases continued until April 7, 1969, when the SEC ordered Chris-Craft to cease its market purchases of Piper common stock. Approximately 9,100 shares of Piper common stock were purchased by Chris-Craft during this period. In addition, during this period of time, and continuing up until on or about August 4, 1969, Chris-Craft caused certain substantial investors to purchase Piper common stock on the open market and hold such stock for the benefit of Chris-Craft and then tender or sell such stock to Chris-Craft when it was legally permissible to do so. Contemporaneously with the foregoing illegal activity, the defendants continued to induce and persuade large investors to continue to trade in Chris-Craft securities on the open market in order to create an appearance of market strength in Chris-Craft's securities as alleged in paragraph 18 above.

29. Chris-Craft's registered exchange offer became effective on May 19, 1969. The exchange offer was made to the public by means of a prospectus dated May 19, 1969 (the "May 19 prospectus"), which contained material omissions and misstatements of fact, all as set forth more fully below in paragraph 34.

30. The Chris-Craft registered exchange offer made by the May 19 prospectus as modified from time to time after the effective date, was extended through July 22, 1969. No common stock was purchased thereunder by Chris-Craft.

31. A registration statement on Form S-1 and a preliminary prospectus for the second Chris-Craft registered exchange offer was filed with the SEC on July 22, 1969 and became effective on July 24, 1969.

32. The second Chris-Craft registered exchange offer was made by means of a prospectus dated July 24, 1969

(the "July 24 prospectus") which prospectus contained material omissions and misstatements of fact, as more fully set forth in paragraph 34 below.

33. The Chris-Craft registered exchange offer made by the July 24 prospectus remained open through August 4, 1969. Chris-Craft purchased approximately 112,000 shares of Piper common stock thereunder.

34. Chris-Craft's May 19 and July 24 prospectuses, as well as the preliminary prospectuses circulated to the public with regard to such registered exchange offers for Piper common stock, contained the following material omissions and misstatements of fact, among others:

(A) The prospectuses did not disclose defendants' scheme and plan concocted in the fall of 1968 to seize control of Piper, of which the registered exchange offers for Piper common stock were a necessary and integral part.

(B) The prospectuses falsely stated the defendants had no present plans to change the management of Piper, whereas the defendants did in fact have definite plans for a change of management and a reorientation of Piper's business and assets, which plans were the motive for the take-over attempt.

(C) The prospectuses did not disclose that all Chris-Craft's purchases of Piper common stock since December 30, 1968, were illegal, thus making all such acquisitions subject to divestment.

(D) The prospectuses did not disclose that for a period of time commencing on January 23, 1969 and continuing during the pendency of Chris-Craft's exchange offers, defendants caused the market price of Chris-Craft's securities to be improperly influenced and affected by others at the request of Chris-Craft.

(E) The prospectuses did not disclose that Chris-Craft's purchases of Piper common stock were made with funds obtained by an illegal bank loan and the improper use of the proceeds of the sale of its convertible debentures in December, 1968.

(F) The prospectuses misrepresented the true cost of the previous purchases of Piper common stock by Chris-Craft by misstating the true application of the proceeds of the Chris-Craft convertible debenture offering and the $15,000,000 bank loan to such purchases, thereby also distorting the pro forma figures on share dilution contained in the prospectuses.

(G) The prospectuses did not disclose the SEC's order to Chris-Craft in April, 1969 to cease its purchases of Piper common stock on the open market.

(H) The prospectuses did not disclose that, of the dollar amount attributed by Chris-Craft to the purchase of Piper common stock prior to the registered exchange offers, approximately $50,000 was paid to a broker or other person or persons unknown, in violation of the rules of the SEC and the New York Stock Exchange.

(I) The prospectuses did not disclose any of the other violations of law herein set forth.

All of the above misstatements and omissions were material and were known by the defendants to be material, and were made in order to further the scheme and plan of the defendants to takeover control of Piper.

35. By reason of the facts set forth hereinabove, the defendants have violated the following securities laws:

(A) Sections 12 and 17 of the 1933 Act,

(B) Section 7(d) of the 1934 Act and Regulation U

issued by the Board of Governors of the Federal Reserve Board thereunder,

(C) Section 9(a) of the 1934 Act,

(D) Section 10b of the 1934 Act and Rules 10b-5 and 10b-6 thereunder,

(E) Sections 13(d) and 14(d) of the 1934 Act,

(F) Section 17 of the 1940 Act.

36. By reason of the facts set forth hereinabove, the defendants have also violated the fiduciary duties and responsibilities they owe to Piper and the Piper stockholders.

37. By means of the fraudulent and illegal acts set forth above, Chris-Craft has acquired approximately 697,500 shares or 42.48% of the outstanding Piper common stock.

38. By means of negotiated transactions with the Piper family and other holders of large blocks of Piper stock, by a registered voluntary exchange offer and by market purchases made after the completion of its exchange offer, Bangor Punta was able to acquire and now owns 835,750 shares or 50.97% of the outstanding Piper stock.

39. The fraudulent and illegal acts of the defendants have greatly increased the cost of Bangor Punta of the acquisition of such shares of Piper stock.

40. But for the fraudulent and illegal acts of the defendants, Bangor Punta would have been able to acquire by the present time substantially all of the outstanding stock of Piper.

41. By reason of the violations of law and the fraudulent practices described herein, Chris-Craft has damaged Bangor Punta in the amount of at least $50,000,000, and its

acquisition and continued ownership of the approximately 697,500 Piper shares it has acquired by means of such violations and fraudulent practices has constituted and will constitute an irreparable injury to Bangor Punta.

WHEREFORE, plaintiff demands judgment:

(1) Requiring Chris-Craft to pay compensatory damages to plaintiff in the amount of $50,000,000;

(2) Requiring Chris-Craft to divest itself of all shares of Piper:

(a) acquired in violation of Sections 12 and 17 of the 1933 Act;

(b) acquired in violation of Section 10(b) of the 1934 Act and Rule 10b-5 thereunder;

(c) acquired in violation of Section 10(b) of the 1934 Act and Rule 10b-6 thereunder;

(d) acquired in violation of Sections 13(d) and 14(d) of the 1934 Act;

(e) acquired in violation of Section 17 of the 1940 Act;

(f) purchased with the proceeds of the sale of its convertible subordinate debentures;

(g) purchased with the proceeds of the illegal bank loan; or

(h) purchased or otherwise acquired by Chris-Craft in transactions involving Chris-Craft's securities whose price was artificially maintained by Chris-Craft or by others or by Chris-Craft's request:

(3) Enjoining Chris-Craft during the pendency of this action and until completion of the divestiture demanded in

paragraph (2) directly above, from voting, asserting the right to vote or exercising any other incidents of ownerships of all shares of Piper common stock illegally acquired;

(4) Granting plaintiff its costs and disbursements together with reasonable counsel fees;

(5) Granting such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
January 26, 1970

WEBSTER SHEFFIELD FLEISCHMANN
HITCHCOCK & BROOKFIELD

By JAMES V. RYAN
Attorneys for Plaintiff
BANGOR PUNTA CORPORATION
1 Rockefeller Plaza
New York, New York 10020
Tel. No. 582-3370

United States District Court

SOUTHERN DISTRICT OF NEW YORK

BANGOR PUNTA CORPORATION,
Plaintiff,
—*against*—
CHRIS-CRAFT INDUSTRIES, INC., et al.,
Defendants.
} 69 Civ. 2354 MP

Answer

Defendant Chris-Craft Industries, Inc. ("Chris-Craft"), by its attorneys, for its answer to plaintiff's first amended complaint:

1. Denies that it has knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph 1 of the complaint, except admits that in said paragraph plaintiff purports to base jurisdiction of this Court on certain provisions of federal law and upon the principle of pendent jurisdiction and alleges that the amount of controversy exceeds $10,000 exclusive of costs.

2. Denies that it has knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph 2 of the complaint, except admits that certain of plaintiff's securities are listed and traded on the New York Stock Exchange ("NYSE") and on the American Stock Exchange.

3. Denies each and every allegation contained in Paragraph 3 of the complaint, except admits that Chris-Craft is a Delaware corporation with its principal executive office at 600 Madison Avenue, New York, N. Y., and that certain of Chris-Craft's securities are listed and traded on the NYSE and on the Pacific Stock Exchange.

Answer of Chris-Craft Industries, Inc.
to First Amended Complaint

4. Denies each and every allegation contained in Paragraph 4 of the complaint, except admits that defendant Herbert J. Siegel is and at all times relevant was President, chief executive officer and a director of Chris-Craft and that the other individual defendants named in the complaint are and were directors, and in some instances, also officers of Chris-Craft.

5. Admits, on information and belief, the allegations contained in Paragraphs 5, 6 and 7 of the complaint.

6. Denies that it has knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph 8 of the complaint, except admits that on or about December 30, 1968 the Piper Aircraft Corporation ("Piper") proxy statement dated December 20, 1968 stated that there were issued and outstanding approximately 1,641,890 shares of Piper common stock of which only 325,422 shares were reported to be owned beneficially, or as of record, by the late William T. Piper, Sr., members of his family and certain organizations controlled by them (collectively referred to as the "Piper family"). To the extent that the Piper family owned beneficially or as of record a greater number of Piper shares, that fact was not disclosed in proxy statements issued by the management of Piper or in reports filed with the Securities and Exchange Commission ("SEC") by members of the Piper family pursuant to the requirements of Section 16(a) of the Securities Exchange Act of 1934, and was concealed from the public. Chris-Craft further admits that at or about December 30, 1968 the principal officers and directors of Piper were members of the Piper family and that the shares of Piper stock not owned by the Piper family were held by the public.

7. Denies each and every allegation contained in Paragraph 9 of the complaint, except admits that Chris-Craft

Answer of Chris-Craft Industries, Inc.
to First Amended Complaint

is a diversified manufacturer with interests in boats, television, industrial and agricultural chemicals and in the manufacture of fiber and foam products, and that its sales in 1968 were in excess of $90 million.

8. Denies each and every allegation contained in Paragraphs 10, 12, 13, 15, 17, 18, 19, 21, 22, 26, 32, 34, 35, 36, 37, 39, 40 and 41 of the complaint.

9. Denies each and every allegation contained in Paragraph 11 of the complaint, except admits that during October 1968 Chris-Craft filed its registration statement for its proposed offer to sell a maximum of $26 million, pursuant to which it sold $21,223,200, principal amount of 6% convertible subordinated debentures and refers to such registration statement for its terms.

10. Denies each and every allegation contained in Paragraph 14 of the complaint, except admits that from December 30, 1968 to January 23, 1969 Chris-Craft purchased shares of Piper common stock through a member in good standing of the NYSE, which member in accordance with its own practices and not at the suggestion of Chris-Craft assigned Account No. 100 to such account. In further answer, Chris-Craft alleges that substantially less than 98,600 shares of Piper common stock, and less than 5% of the outstanding shares of Piper stock, had been delivered to Chris-Craft's custody or control by January 22, 1969.

11. Denies each and every allegation contained in Paragraph 16 of the complaint, except admits that on or about January 23, 1969, pursuant to a written agreement, Chris-Craft purchased 101,000 shares of Piper stock from Technology Fund, Inc., an investment company, at $65 per Piper share, the same price at which Chris-Craft immediately thereafter made a public tender offer to the shareholders of Piper, and that Technology Fund gave Chris-Craft its

proxy to vote the shares of Piper common stock when it sold and delivered those shares to Chris-Craft.

12. Denies each and every allegation contained in Paragraph 20 of the complaint, except admits that on January 23, 1969 Chris-Craft published the announcement of its cash tender offer for up to 300,000 shares of Piper common stock with the right to purchase additional shares at $65 a share, and that it filed a Schedule 13-D with the SEC on the same date, and refers to said announcement and schedule for the terms thereof.

13. In answer to Paragraph 23 of the complaint, Chris-Craft alleges that its cash tender offer expired on February 3, 1969 and that 304,606 shares of Piper common stock were tendered to Chris-Craft and purchased by it pursuant to such tender offer.

14. Denies each and every allegation contained in Paragraph 24 of the complaint, except admits that at the Piper annual meeting convened on February 4, 1969 Chris-Craft presented its proxies, that the meeting was adjourned until the appointed judges of election finalized the vote and that when the meeting reconvened on March 25, 1969 defendants James J. Rochlis and C. Leonard Gordon were elected to the Board of Directors of Piper.

15. Denies each and every allegation contained in Paragraph 25 of the complaint, except admits that in February 1969 Chris-Craft borrowed $15 million from a bank under a demand note.

16. Denies each and every allegation contained in Paragraph 27 of the complaint, except admits that on or about February 27, 1969 Chris-Craft filed its registration statement and preliminary prospectus with the SEC for its registered exchange offer of Chris-Craft securities for shares of Piper stock.

17. Denies each and every allegation contained in Paragraph 28 of the complaint, except admits that between March 18, 1969 and April 7, 1969 Chris-Craft purchased 9,100 shares of Piper common stock on the open market, and on April 7, 1969 members of the staff of the SEC told Chris-Craft that neither it nor the management of Piper nor any third party acting with or for Piper were permitted to make any further direct or indirect purchases of Piper stock during the pendency of Chris-Craft's exchange offer.

18. Denies each and every allegation contained in Paragraph 29 of the complaint, except admits that Chris-Craft's registered exchange offer became effective on May 19, 1969 and was made to the public by a prospectus dated May 19, 1969.

19. Admits the allegations contained in Paragraphs 30 and 31 of the complaint.

20. Admits the allegations contained in Paragraph 33 of the complaint, except alleges that Chris-Craft purchased 112,089 shares of Piper common stock pursuant to its registered exchange offer made by the July 24, 1969 prospectus.

FIRST AFFIRMATIVE DEFENSE

21. On information and belief, Bangor Punta did not become a shareholder of Piper or enter into any contracts for the purchase of any shares of Piper until May 8, 1969.

22. Paragraphs 1 through 28 of Bangor Punta's first amended complaint refer to and complain of events alleged to have occurred prior to May 6, 1969.

23. By reason of the foregoing, Bangor Punta does not have standing to complain of any acts or transactions which took place prior to the time it became a shareholder of Piper.

Answer of Chris-Craft Industries, Inc.
to First Amended Complaint

SECOND AFFIRMATIVE DEFENSE

24. Bangor Punta's first amended complaint alleges claims which arise out of the same transactions and occurrences that are the subject matter of the action commenced by Chris-Craft against Bangor Punta and others in this Court on May 22, 1969 (69 Civ. 2227).

25. By reason of the foregoing, Bangor Punta was required to set forth its claims against Chris-Craft as counterclaims in the aforesaid action commenced by Chris-Craft.

26. Chris-Craft hereby incorporates as an affirmative defense to this action all the allegations of its amended complaint in 69 Civ. 2227 and all allegations that may hereafter be made by it in amended or supplemental pleadings filed in such action.

Dated: New York, N. Y.
March 6, 1970

PAUL, WEISS, GOLDBERG, RIFKIND,
WHARTON & GARRISON

By JOSEPH J. ACKELL
Attorneys for defendant
Chris-Craft Industries, Inc.
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United States District Court

SOUTHERN DISTRICT OF NEW YORK

BANGOR PUNTA CORPORATION,
Plaintiff,
—*against*—
CHRIS-CRAFT INDUSTRIES, INC., *et al.*,
Defendants.

69 Civ. 2354 MP

ANSWER

Defendants Loeb, Rhoades & Co. and Shields & Co. Inc., by their attorneys, Cahill, Gordon, Sonnett, Reindel & Ohl, answering the first amended complaint herein:

1. Deny knowledge or information sufficient to form a belief as to the truth of any allegations contained in Paragraph 1 of the complaint, except admit that in said paragraph plaintiff purports to base jurisdiction of this Court on certain provisions of federal law and upon the principle of pendent jurisdiction and alleges that the amount of controversy exceeds $10,000 exclusive of costs.

2. Deny knowledge or information sufficient to form a belief as to the truth of any allegation contained in Paragraph 2 of the complaint, except admit that certain of plaintiff's securities are listed and traded on the New York Stock Exchange and on the American Stock Exchange.

3. Deny each and every allegation contained in Paragraph 3 of the complaint except admit that Chris-Craft is a Delaware corporation with its principal executive office at 600 Madison Avenue, New York, New York, and that certain of Chris-Craft's securities are listed and traded on the New York Stock Exchange and on the Pacific Stock Exchange.

4. Deny each and every allegation contained in Paragraph 4 of the complaint except admit that the defendant Herbert J. Siegel is and at all times relevant was President,

chief executive officer and a director of Chris-Craft and that the other individual defendants named in the complaint are and were directors, and, in some instances, also officers of Chris-Craft.

5. Admit, on information and belief, the allegations contained in Paragraphs 7 and 33 of the complaint.

6. Deny knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraphs 8, 14 and 38 of the complaint.

7. Deny each and every allegation contained in Paragraph 9 of the complaint, except admit that Chris-Craft is a diversified manufacturer with interests in boats, television, industrial and agricultural chemicals and in the manufacture of fiber and foam products, and that its sales in 1968 were in excess of $90 million.

8. Deny each and every allegation contained in Paragraphs 10, 12, 13, 18, 19, 32, 34, 35, 36, 37, 39, 40 and 41 of the complaint.

9. Deny each and every allegation contained in Paragraph 11 of the complaint, except admit that during October 1968 Chris-Craft filed its registration statement for its proposed offer to sell a maximum of $26 million, pursuant to which it sold $21,223,200, principal amount of 6% convertible subordinated debentures and refer to such registration statement for its terms.

10. Deny knowledge or information sufficient to form a belief as to any of the allegations contained in Paragraphs 16 and 17 of the complaint, except admit, on information and belief, that on or about January 23, 1969 Chris-Craft purchased 101,000 shares of Piper stock at $65 per Piper share.

11. Deny, on information and belief, each and every allegation contained in Paragraphs 15, 21, 22 and 26 of the complaint.

12. Deny each and every allegation contained in Paragraph 20 of the complaint, except admit, on information and belief, that on January 23, 1969 Chris-Craft published the announcement of its cash tender offer for up to 300,000 shares of Piper Common Stock with the right to purchase additional shares at $65 a share, and that it filed a Schedule 13-D with the SEC on the same date, and refer to said announcement and schedule for the terms thereof.

13. In answer to Paragraph 23 of the complaint, the defendants admit that Chris-Craft's cash tender offer expired on February 3, 1969 and allege that 304,606 shares of Piper Common Stock were tendered to Chris-Craft and purchased by it pursuant to such tender offer.

14. Deny, on information and belief, each and every allegation contained in Paragraph 24 of the complaint, except admit that at the Piper annual meeting convened on February 4, 1969 Chris-Craft presented its proxies, that the meeting was adjourned until the appointed judges of election finalized the vote and that when the meeting reconvened on March 25, 1969 defendants James J. Rochlis and C. Leonard Gordon were elected to the Board of Directors of Piper.

15. Deny, on information and belief, each and every allegation contained in Paragraph 25 of the complaint, except admit that in February 1969 Chris-Craft borrowed $15 million from a bank under a demand note.

16. Deny each and every allegation contained in Paragraph 27 of the complaint, except admit that on or about February 27, 1969 Chris-Craft filed its registration statement and preliminary prospectus with the SEC for its

registered exchange offer of Chris-Craft securities for shares of Piper stock.

17. Deny each and every allegation contained in Paragraph 28 of the complaint, except admit, on information and belief, that Chris-Craft purchased shares of Piper Common Stock on the open market, and on April 7, 1969 members of the staff of the SEC told Chris-Craft that neither it nor the management of Piper nor any third-party acting with or for Piper were permitted to make any further direct or indirect purchases of Piper stock during the pendency of Chris-Craft's exchange offer.

18. Deny each and every allegation contained in Paragraph 29 of the complaint, except admit that Chris-Craft's registered exchange offer became effective on May 19, 1969 and was made to the public by a prospectus dated May 19, 1969.

FIRST AFFIRMATIVE DEFENSE

19. The complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

20. On information and belief, Bangor Punta did not become a shareholder of Piper or enter into any contracts for the purchase of any shares of Piper until May 8, 1969.

21. Paragraphs 1 through 28 of Bangor Punta's first amended complaint refer to and complain of events alleged to have occurred prior to May 8, 1969.

22. By reason of the foregoing, Bangor Punta does not have standing to complain of any acts or transactions which took place prior to the time it became a shareholder of Piper.

THIRD AFFIRMATIVE DEFENSE

23. As to statements made in any registration statements or prospectuses referred to in the first amended complaint, the defendants, after reasonable investigation, had reasonable ground to believe and did believe at the time said registration statements and prospectuses became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

Dated: New York, New York
April 27, 1970

CAHILL, GORDON, SONNETT, REINDEL & OHL

By MICHAEL F. ARMSTRONG
A Member of the Firm
Attorneys for Defendants
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944-7400

United States District Court

SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

BANGOR PUNTA CORPORATION,
Defendant.

} 70 Civ.

Complaint

Plaintiff, the Securities and Exchange Commission ("the Commission"), for its complaint, alleges upon information and belief:

1. Defendant Bangor Punta Corporation ("Bangor Punta") has engaged and is reasonably likely to engage again in acts and practices which have constituted and will constitute violations of sections 7, 10(a) and 17(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. 77g, 77j(a) and 77q(a), as well as section 10(b) of the Securities Exchange Act of 1934 ("Securities Exchange Act"), 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 CFR 240.10b-5.

2. The Commission is authorized to bring this action pursuant to section 20(b) of the Securities Act, 15 U.S.C. 77t(b), and section 21(e) of the Securities Exchange Act, 15 U.S.C. 78u(e). The jurisdiction of this Court is based upon section 22(a) of the Securities Act, 15 U.S.C. 77v(a), and section 27 of the Securities Exchange Act, 15 U.S.C. 78aa.

3. Defendant Bangor Punta, a corporation organized under the laws of the State of Delaware, transacts business within the Southern District of New York.

4. The acts and practices, or some of them, constituting the violations of law complained of took place within the Southern District of New York.

5. The defendant Bangor Punta, directly and indirectly, made use of the mails and of the means or instruments of interstate commerce in connection with the acts and practices alleged herein.

6. On or about May 29, 1969, defendant Bangor Punta filed with the Commission a registration statement (including a prospectus) for a public offering of securities in connection with a proposed exchange offer for the common stock of Piper Aircraft Corporation ("Piper"). Said registration statement became effective on July 18, 1969, and Bangor Punta then caused prospectuses to be disseminated to all Piper shareholders.

7. Bangor Punta, through its exchange offer of July 1969, obtained 111,628 shares of Piper, or about 7% of the 1,644,790 shares of Piper common stock outstanding. Together with other acquisitions of Piper shares, Bangor Punta was able to obtain about 51% of the shares of common stock of Piper, while Chris-Craft Corporation, Bangor Punta's chief competitor for Piper since early 1969, acquired about 42% of Piper's common stock.

8. Bangor Punta's registration statement in connection with its exchange offer for Piper shares, and the prospectus included in the registration statement, discussed at considerable length the company's 98.7% owned subsidiary, the Bangor and Aroostook Railroad ("Railroad").

9. Bangor Punta's aforesaid registration statement and prospectus were materially deficient because they omitted to disclose the relevant facts concerning: (a) the company's firm general decision to sell the Railroad at a substantial loss over its carrying value on the books and financial statements of Bangor Punta; and (b) the company's specific decision to sell the Railroad to Amoskeag Company

("Amoskeag") at a $14,000,000 loss over the carrying value of the Railroad on Bangor Punta's financial statements.

10. When the Railroad sale to Amoskeag was formally concluded on October 2, 1969, the sales price of $5,000,000 resulted in an extraordinary loss of approximately $14,000,000, based on the carrying value of the Railroad on Bangor Punta's financial statements. The amount of this $14,000,000 loss far exceeded Bangor Punta's consolidated net income (before extraordinary items) of some $6,000,000 for the fiscal year ended September 30, 1969.

11. Bangor Punta filed said registration statement and prospectus for the exchange offer on May 29, 1969. During the two months preceding the filing these developments had occurred in regard to the sale of the Railroad:

(a) The board of directors of Bangor Punta had decided to dispose of the Railroad and had appointed a special committee of three of its members to study the alternatives. The basic reason for disposing of the Railroad was that in order to break even, it would require a heavy infusion of capital by Bangor Punta—perhaps as much as $5,000,000 over the next five years. In addition, the Railroad's earnings had been steadily deteriorating during the past three years.

(b) The special committee had decided upon sale of the Railroad as the only feasible alternative, and had obtained a tentative offer of $5,000,000 for its capital stock from Amoskeag, the only party known to have an interest in making the purchase.

(c) The Bangor Punta board of directors, after being informed of Amoskeag's tentative offer, authorized the chairman of the special committee, Curtis M. Hutchins:

(i) to negotiate with Amoskeag for its purchase of the capital stock of the Railroad for a total sum of $7,000,000, 51% to be purchased for some $3,250,000 and the remaining 49% to be optioned to Amoskeag at a higher price; and

(ii) to negotiate with Amoskeag for its purchase of 100% of the Railroad subject to further investigation of the accounting and tax ramifications of such a transaction and approval by the board of directors or the executive committee of the board.

(d) Hutchins, with the board's authorization in hand, communicated the $7,000,000 counter offer to Amoskeag, which flatly rejected it (as Hutchins had predicted to the Bangor Punta board). Hutchins then arrived at a written understanding with Amoskeag, subject to approval of the Bangor Punta board. The understanding, dated and hand delivered on May 27, 1969, called for the sale of all of the Railroad stock to Amoskeag for $5,000,000 (either in cash or in Bangor Punta securities held by Amoskeag, at Bangor Punta's option).

12. Two days after Hutchins' written understanding with Amoskeag, Bangor Punta filed with the Commission said registration statement and prospectus for the exchange offer. More than seven weeks elapsed between the filing of the registration statement and its effective date on July 18, 1969. During this period, the Bangor Punta board took no formal action with regard to the sale of the Railroad. Instead, Hutchins, on July 16, 1969, telephoned the president of Amoskeag—F. C. Dumaine, Jr.—and asked him to delay consummation of the Railroad sale in order to avoid disclosure of the transaction in Bangor Punta's pending registration statement. Dumaine prepared a memorandum to his files recording the substance of the conversation:

"Curtis Hutchins said we definitely have a deal—they are in registration—he hopes to be out of registration

in ten days—of course, that is questionable. He was informed by his lawyers that a definite commitment should not be made within two months of registration. We agreed that in the meantime I should go over the railroad with whomever I want to see the overall condition of the property and to meet the staff so that I will be prepared to select a staff on consummation date, if and when we have a consummation date."

13. In August 1969, prior to the time when Bangor Punta's board of directors formally approved the sale of the Railroad to Amoskeag for $5,000,000, John M. Coward presented an offer to Bangor Punta to buy the stock of the Railroad for $10,000,000 (payable $4,000,000 at closing and $1,000,000 per year for six years, with Bangor Punta to hold the stock as collateral and to collect interest at the prime rate on the unpaid balance). Bangor Punta rejected this offer because of its commitment to Amoskeag.

14. In September 1969, the Bangor Punta board of directors approved the $5,000,000 sale of the Railroad stock to Amoskeag. The formal agreement dated October 2, 1969, embodied the essential terms of Bangor Punta's written understanding with Amoskeag of May 27, 1969 (¶ 11(d), *supra*).

15. The Railroad sale and the resultant loss to Bangor Punta were material facts in the following respects, among others:

(a) *Large amount of loss and impact upon income.* In Bangor Punta's financial statements for the fiscal year ended September 30, 1969, the $14,000,000 loss on sale of the Railroad was deducted from earnings as an extraordinary loss item. Consolidated net income (after taxes) for that fiscal year, by way of contrast, was only about $6,000,000 (before the loss on sale of the Railroad), and for the six month period ended March 31, 1969, was $5,032,000. (The consolidated net income, after taxes, for prior fiscal years was: 1968—$8,244,000;

1967—$5,571,000; 1966—$5,569,000; 1965—$5,578,000; and 1964—$3,749,000.) Bangor Punta's net loss for the fiscal year ended September 30, 1969, was about $8,600,000.

(b) *Impact upon retained earnings and stockholders' equity.* The $14,000,000 loss comprised about 36% of Bangor Punta's retained earnings of some $38,000,000 as of the fiscal year beginning October 1, 1968, and also amounted to about 11% of stockholders' equity as of the same date.

(c) *Impact upon market price.* Immediately following both the announcement of sale of the Railroad, on October 3, 1969, and the release on December 2, 1969, of Bangor Punta's financial statements for fiscal 1969, Bangor Punta's common stock declined steadily on the New York Stock Exchange for at least a week (with one day's exception each period). During the period beginning October 3, 1969, through October 10, 1969, the market price for the common stock of Bangor Punta Corp. declined 4.6%. For the week beginning December 3 through the 10th, Bangor Punta common stock declined 13.6%.

(d) *Bangor Punta's contemporaneous opinion of the materiality of the Railroad sale.* Bangor Punta not only treated the Railroad at length on a going-concern basis in its registration statement but also assiduously strove to delay consummation of the Railroad sale until after conclusion of the exchange offer.

16. Defendant Bangor Punta violated section 17(a) of the Securities Act, 15 U.S.C. 77q(a), section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 CFR 240.10b-5, by failing to disclose in its registration statement and prospectus facts concerning the disposition of the Railroad. Said omissions rendered materially misleading statements which were made concerning the business and financial condition of Bangor Punta.

17. Defendant Bangor Punta violated sections 7 and 10(a) of the Securities Act, 15 U.S.C. 77g and 77j(a), by reason of the failure of its registration statement and prospectus to disclose the company's intended cessation of its Railroad business and the consequences flowing therefrom.

18. Defendant Bangor Punta will, unless restrained and enjoined, continue to engage in the acts and practices set forth in this complaint and in acts and practices of similar purport. In fact, defendant Bangor Punta has demonstrated a propensity for violating the securities laws. The registration statement which is the subject of this action was filed by Bangor Punta pursuant to a permanent injunction obtained by the Commission against "gun jumping" violations by that company and Piper involving the registration provisions of the Securities Act, 15 U.S.C. 77e(c). *Securities and Exchange Commission* v. *Bangor Punta Corporation and Piper Aircraft Corporation*, Civil Action No. 1388-68 (D.D.C. 1969). The injunction, entered on May 26, 1969, upon consent of the defendants without admission of the allegations in the complaint, ordered Bangor Punta to file within 10 days a registration statement for the exchange offer for Piper shares or else discontinue the offering. The injunction, in relevant part, further ordered Bangor Punta not to "announce or implement any exchange offer unless and until such announcement of said exchange offer and the exchange offer comply with the registration provisions of the Federal securities laws." The court injunction notwithstanding, Bangor Punta proceeded to file a registration statement which failed in material respects to make the adequate disclosure required by the registration provisions of the securities laws. Moreover, as has been previously alleged (¶¶ 8, 11, 12), Bangor Punta's failure to disclose was made in a context which establishes unequivocally that the company itself regarded the omitted information to be material.

WHEREFORE Plaintiff demands judgment:

1. Enjoining the defendant Bangor Punta from further acts and practices in violation of section 7 of the Securities Act, 15 U.S.C. 77g, and the rules and regulations thereunder; section 10(a) of the Securities Act, 15 U.S.C. 77j, and the rules and regulations thereunder; section 17(a) of the Securities Act, 15 U.S.C. 77q(a); and section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 CFR 240.10b-5.

2. Ordering the defendant Bangor Punta to make an offer of rescission to all shareholders who exchanged shares of the common stock of Piper with Bangor Punta pursuant to the exchange offer of July 1969.

3. Awarding such other and further relief as the Court may deem just and proper.

KEVIN THOMAS DUFFY
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Securities and Exchange Commission
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Respectfully submitted,

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United States District Court

SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
—against—
BANGOR PUNTA CORPORATION,
Defendant.

70 Civ. 3490: MP

ANSWER

The defendant, Bangor Punta Corporation ("Bangor Punta"), by its attorneys, Webster Sheffield Fleischmann Hitchcock & Brookfield, for its answer to the complaint herein alleges as follows:

FIRST: Denies each and every allegation contained in paragraphs "1" and "2" of the complaint.

SECOND: Denies each and every allegation contained in paragraph "3" of the complaint except Bangor Punta admits it is a corporation organized under the laws of the State of Delaware.

THIRD: Denies each and every allegation contained in paragraphs "4" and "5" of the complaint.

FOURTH: Denies each and every allegation contained in paragraph "7" of the complaint and affirmatively alleges that Bangor Punta acquired (a) 612,718 shares of Piper Aircraft Corporation ("Piper") common stock pursuant to the registered exchange offers it made to members of the Piper family and to all other holders of Piper common stock between July 18, 1969 and July 29, 1969; (b) 120,200 shares of Piper common stock purchased for cash in five unsolicited transactions off any registered stock exchange between May 14 and May 23, 1969; and (c) 100,614 shares of

Piper common stock purchased on the open market subsequent to August 8, 1969. Bangor Punta now owns of record a total of approximately 838,156 shares of Piper common stock of approximately fifty and seven-tenths of one percent (50.7%) of all the outstanding shares of Piper common stock. Further Bangor Punta has continued to purchase shares of Piper common stock on the open market from time to time. While Chris-Craft Industries, Inc. ("Chris-Craft") purports to own approximately 697,495 shares of Piper common stock, Bangor Punta claims Chris-Craft acquired such Piper shares in flagrant violation of the securities laws and is seeking appropriate relief against Chris-Craft in actions now pending in this Court.

FIFTH: Denies each and every allegation contained in paragraph "8" of the complaint and respectfully refers the Court to the registration statement and prospectus of Bangor Punta relating to the exchange offer for the contents thereof.

SIXTH: Denies each and every allegation contained in paragraph "9" of the complaint.

SEVENTH: Denies each and every allegation contained in paragraph "10" of the complaint and affirmatively alleges that on October 2, 1969, Bangor Punta sold all of the shares of capital stock of the Bangor & Aroostook Railroad Company ("BAR") owned by it to Amoskeag Corporation for $5,000,000 in cash, plus additional valuable cash considerations payable to Bangor Punta depending upon the occurrence of certain events in the future. For accounting purposes only (not cash purposes), Bangor Punta incurred an extraordinary loss of $13,813,289 before any consideration is given to the receipt of additional cash payments that may be received from Amoskeag Corporation under the terms of the sale.

EIGHTH: Denies each and every allegation contained in paragraph "11" of the complaint and affirmatively alleges that Bangor Punta filed a registration statement including a prospectus with the plaintiff for its exchange offers to the Piper family and all other holders of Piper common stock on May 29, 1969.

NINTH: Denies each and every allegation contained in paragraphs "12" and "13" of the complaint.

TENTH: Denies each and every allegation contained in paragraph "14" of the complaint and respectfully refers the Court to the several agreements dated October 2, 1969 between Bangor Punta and Amoskeag Corporation concerning the sale of the stock interests of Bangor Punta in the BAR to Amoskeag Corporation for the terms thereof.

ELEVENTH: Denies each and every allegation contained in paragraph "15" of the complaint and affirmatively alleges (a) that Bangor Punta incurred an extraordinary loss for accounting purposes (not cash loss) on October 2, 1969, of $13,813,289 as a result of its disposition of its stock interest in the BAR which had no impact or effect on Bangor Punta's earnings from its operation; (b) the extraordinary loss incurred had the effect of eliminating from the "retained earnings" item on the Bangor Punta balance sheet the extraordinary gain of $10,288,629 realized by Bangor Punta on September 30, 1965 when this investment of Bangor Punta in the BAR was increased on the balance sheet of Bangor Punta from $8,096,179 to $18,384,808 based on an appraisal of the then market value of the BAR shares. The foregoing information was fully disclosed to the public in the Bangor Punta and BAR financials incorporated in the prospectus for the exchange offer; (c) in fiscal 1968, the earnings of the BAR constituted less than one percent (1%) of the net earnings of Bangor Punta; and (d) on October 3, 1969, Bangor Punta common stock closed on the

New York Stock Exchange at $21 per share and between such date and October 10, 1969, Bangor Punta common stock closed between 21⅜ and 20⅛; and that between October 11 and October 21, 1969, after the news of the sale of the BAR by Bangor Punta had been fully assimilated by the investment community, Bangor Punta common stock closed between 22 and 24⅞, for an increase in value of the common stock of Bangor Punta of almost twenty percent (20%). Beginning in early 1969 and continuing throughout 1969, it is common knowledge that the prices of common stocks generally declined markedly as a result of a number of factors including by December, 1969, tax selling. Although Bangor Punta common stock closed at 18⅜ on December 3, 1969 and at 15⅞ on December 10, 1969 and remained in the $15 range through December, 1969, by January 5, 1970, Bangor Punta common stock again closed at 18⅝.

TWELFTH: Denies each and every allegation contained in paragraphs "16", "17" and "18" of the complaint.

AS AND FOR A FIRST COMPLETE AFFIRMATIVE DEFENSE

THIRTEENTH: The complaint herein is sham and false because there is no good ground to support the allegations of the complaint within the meaning of F.R.C.P. Rule 11. If Bangor Punta can establish that this action was commenced by the plaintiff without good cause, Bangor Punta may be entitled to be reimbursed for all its counsel fees and other direct and indirect expenses incurred in defending itself.

AS AND FOR A SECOND COMPLETE AFFIRMATIVE DEFENSE

FOURTEENTH: Upon information and belief, since May, 1969, the administrative staff of the plaintiff has been engaged in a course of conduct, the intended result of which is to interfere on behalf of Chris-Craft in the corporate struggle for control of Piper that has been going on between Bangor Punta and Chris-Craft since May, 1969. These

wrongful activities of the administrative staff of the plaintiff may have been prompted by, or be the result of their own internal confusion and error. As a result of such internal confusion and error the administrative staff may believe they have afforded inequitable treatment to Chris-Craft in its fight for control of Piper in the spring of 1969, and are attempting to correct the effects of their actions by attempting unjustly to make Bangor Punta suffer for the administrative staff's own failures. If such improper motives are established from evidence developed in discovery proceedings herein, in addition to constituting the equitable defense of "unclean hands" on the part of the plaintiff, Bangor Punta may be entitled to affirmative injunctive relief against continued interference by the administrative staff of plaintiff with the affairs of Bangor Punta.

WHEREFORE Bangor Punta demands that the complaint herein be dismissed with prejudice, that it be awarded a judgment against the plaintiff for its counsel fees and all other direct and indirect expenses including costs and disbursements incurred by it in defending this action, and for such other and further relief as this Court deems proper in the premises.

Dated: New York, New York
October 14, 1970

WEBSTER SHEFFIELD FLEISCHMANN
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IN THE

Supreme Court of the United States

October Term, 1975

Nos. 75-353
75-354
75-355

HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., THE FIRST BOSTON CORPORATION, BANGOR PUNTA CORPORATION, NICOLAS M. SALGO, and DAVID W. WALLACE,

Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITIONS FOR CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1975

Nos. 75-353
75-354
75-355

HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., THE FIRST BOSTON CORPORATION, BANGOR PUNTA CORPORATION, NICHOLAS M. SALGO, and DAVID W. WALLACE,

Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITIONS FOR CERTIORARI

This brief is submitted by respondent Chris-Craft Industries, Inc., in opposition to three petitions for writs of certiorari filed by Bangor Punta Corporation and two of its officers, by former insiders of the Piper Aircraft Corporation and by The First Boston Corporation.

Questions Presented

This case presents no issue worthy of certiorari. It raises no conflicts among the circuits or unsettled questions of law. Instead, it involves traditional legal principles applied to the litigated and now undisputed facts.

This is a case of massive violations of the anti-fraud and anti-manipulation provisions of the federal securities laws. After extensive non-jury trials, the Second Circuit held on three separate occasions, in a series of opinions totaling almost 200 pages, that petitioners had committed blatant violations and inflicted extensive injury on Chris-Craft. *Chris-Craft I* (426 F.2d 569) and *Chris-Craft II* (480 F.2d 341) found the violations and the injury. *Chris-Craft III* (516 F.2d 172) calculated the damages. The Second Circuit acted *en banc* in the first case and *en banc* reconsideration was denied in the other two appeals (E 13-15, E 6-8).*

No new legal principles were involved in these appeals —merely the application of well-worn principles to overwhelming evidence of fraud. Indeed, the *Chris-Craft* opinions have already been cited with approval in over 50 reported cases throughout the nation precisely because they reflect well-established legal principles long approved by this Court.

---

* References preceded by a letter are to petitioners' Joint Appendices in this Court. References followed by "A" are to the Appendix filed in the Second Circuit in *Chris-Craft III*. References preceded by "EV" are to the Exhibit Volumes filed in the Second Circuit in *Chris-Craft III*.

Significantly, petitioners no longer deny their violations. Nor do they deny that those violations spelled the mathematical difference between victory and defeat in an extremely close contest between Bangor Punta and Chris-Craft for control of Piper. Petitioners won because they violated the law. Chris-Craft lost because it obeyed the law. As a result, Chris-Craft's $60 million investment* in Piper was converted into an albatross—an unsalable, huge minority block.

This case is before this Court for the second time. Two years ago, this Court denied similar certiorari petitions. 414 U.S. 910 (1973).

In these circumstances, the petitions raise the following questions:

1. Should this Court grant certiorari where the Second Circuit's opinions apply traditional and conservative standards approved by this Court, and where there are no conflicts among the circuits or novel questions of law?

2. Should this Court grant certiorari to review the Second Circuit's arithmetic as to damages, where the Court expressly awarded the "minimum" measure of damages that the District Court could have awarded on the full record, and where the testimony of petitioners' own star expert led to virtually the same damage figure?

3. Should this Court grant certiorari to consider petitioners' belated request for an apportionment of damages

---

* This includes Chris-Craft's $44 million investment in acquiring Piper stock plus more than $14 million in carrying charges.

among the wrongdoers, where this matter was not asserted below and where petitioners can resolve their internecine disputes another day in their own separate proceeding for contribution?

4. Should this Court grant certiorari to consider First Boston's claim that investment bankers are immune from liability in control contests regardless of their conduct by virtue of Section 11 of the Securities Act of 1933, even though First Boston here was held liable under the far more stringent fraud standards of Section 14(e) of the Securities Exchange Act of 1934 and even though it is settled law that persons guilty of violating the anti-fraud provisions of the securities laws cannot hide behind Section 11?

Statement of the Case

This six year old case—involving a litigated record of almost 5,000 pages—arises out of a 1969 struggle between Bangor and Chris-Craft for control of Piper, then a publicly-held corporation listed on the New York Stock Exchange. Chris-Craft, as noted above, invested approximately $60 million in the contest, including carrying charges, and concededly would have held a commanding lead in a fair contest not tainted by petitioners' repeated violations. But instead, Chris-Craft ultimately lost by 50%-42% because Bangor acquired 14½% of Piper's shares by admitted violations of the securities laws. In addition to depriving Chris-Craft of a fair opportunity to compete for control, petitioners' fraudulent conduct reduced its multi-million dollar investment into an illiquid minority block salable, if at all, only at a distress price.

Since the facts are fully set forth in the Second Circuit's three well-reasoned opinions, we summarize only the highlights.

The Pipers' Scorched Earth Policy

On January 23, 1969,* Chris-Craft announced a cash tender offer to Piper stockholders for 300,000 or more shares at $65 a share (A 10, EV 709).** Piper's insiders, threatening to pursue a "scorched earth policy" to stop Chris-Craft (1890A), summoned First Boston to assist in a campaign against it (A 10-11). Four days later, the insiders wrote to Piper's public shareholders that Chris-Craft's offer was "inadequate," even though First Boston had privately advised them that $65 was in fact a fair price (A 11, 38). The Second Circuit held that these letters violated Section 14(e) of the Williams Act,† a 1968 amendment to the Securities Exchange Act of 1934:

> "The Piper family's culpability regarding these shareholder letters is clear. Corporate officers and directors in their relations with shareholders owe a high fiduciary duty of honesty and fair dealing .... The Piper family obviously disregarded this obligation when they sent out these shareholder letters knowing that they were materially misleading." (A 38)

A few days later, the Piper insiders issued a press release stating that Grumman Aircraft Corp. had "agreed to purchase" 300,000 Piper shares at $65 a share—*i.e.*, a firm commitment to invest almost $20,000,000 in Piper.

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* All dates herein refer to 1969 unless otherwise indicated.

** Chris-Craft had previously purchased approximately 200,000 of Piper's 1,644,890 outstanding shares (A 10).

† 15 U.S.C. §78n(e).

But, in truth, the Piper insiders had merely given Grumman a free *option* to purchase those shares—an option that lapsed (A 11-12, 39). Piper's president admitted that the aim of the Grumman escapade was to make Chris-Craft's tender offer "less attractive to our shareholders" (2114-15A). It had the intended effect. The Second Circuit recognized that the fraudulent press release "adversely affected" Chris-Craft's tender offer:

> ". . . Piper's failure to describe the put in its press release, or in its subsequent letter to shareholders, constituted a material omission in violation of §14(e) . . . . The Piper family recklessly disregarded its obligation to shareholders in failing to disclose with substantial accuracy a transaction which was likely to affect the attitude of Piper shareholders toward the CCI tender offer." (A 39-40)

Because of the foregoing fraudulent statements, Chris-Craft's tender offer—although $12.50, or 20%, above the then stock market price—attracted only about 300,000 of the more than 900,000 Piper shares in the public's hands (A 10, 12, 62). The Second Circuit, after carefully reviewing the extensive trial record, concluded that those fraudulent statements not only deprived Chris-Craft of an opportunity to gain more shares on its cash tender offer but also had a continuing adverse effect on Chris-Craft throughout the contest:

> "[T]hese misleading statements more than likely had a continuing adverse effect on CCI's attempt to acquire Piper shares. When Piper shareholders were deciding whether or not to accept CCI's [subsequent] exchange offer, many undoubtedly remembered and were influenced by the Piper family's misleading January statements portraying CCI as a company that made inadequate and unfair offers." (A 62-63)

Bangor Punta Enters the Contest

On May 8, the day after Chris-Craft announced an exchange offer to Piper shareholders, the insiders turned to Bangor, recruited by First Boston, to resist Chris-Craft (A 14). The insiders sold their Piper holdings (approximately 30%) to Bangor in exchange for a package of Bangor securities worth $70-$72 per Piper share (A 14). Bangor simultaneously agreed to offer Piper's public shareholders what Bangor's and Piper's joint May 8 press release referred to as "a package of Bangor Punta securities to be valued in the judgment of The First Boston Corporation at not less than $80 per Piper share" (329A). The Second Circuit, *en banc*, held that the press release violated the SEC's "gun-jumping" rule* because it placed a dollar value on an unspecified bundle of Bangor securities as to which no registration statement had been filed (C 9-15).** The SEC brought an action against Piper and Bangor for this violation. They consented to an injunction against further violations of the securities laws during the control contest (A 15, C 6).

To insure the success of its exchange offer, Bangor gave the Piper insiders a private incentive to use their influence with Piper's public shareholders. Thus, Bangor promised to increase the compensation to the insiders from $70 to $80 per share if they helped Bangor obtain more than

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* 15 U.S.C. §77e; 17 C.F.R. §230.135.

** In contrast, Chris-Craft's announcement of its exchange offer for Piper stock complied with SEC rules by placing no value on its package.

50% of Piper's stock (A 14-15). By July 18, the effective date of Bangor's exchange offer, the Piper insiders stood to reap a windfall of $13,000,000 (EV 259-60) if they could persuade enough public shareholders to accept Bangor's exchange offer instead of Chris-Craft's. Accordingly, the insiders issued letters and press releases in June and July urging the public shareholders to side with Bangor instead of Chris-Craft. Those communications all concealed the $13,000,000 bonus (A 40-41). The Second Circuit, again finding a Section 14(e) violation, stated:

> "Under these circumstances, the Piper shareholders were entitled to receive information sufficient to make an informed judgment on the weight to be given the personal recommendations of the Piper family. *Cf. SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 197-201 (1963)." (A 41)*

Bangor Punta's Illegal Cash Purchases of Key Blocks from Cornfeld and Others

Petitioners and Chris-Craft recognized that the close control contest might well depend on certain key blocks of Piper stock (approximately 7½% of the outstanding shares) held by three funds, the largest of which was controlled by Bernard Cornfeld.** But SEC Rule 10b-6† pro-

* But the Second Circuit, applying a strict standard of causation, held that this violation did not injure Chris-Craft because Chris-Craft had discovered the side-deal and reported it to Piper shareholders (A 63).

** At an April meeting attended by all petitioners, First Boston stated that if these blocks could be taken "from under" Chris-Craft, petitioners' chances of victory were good (382A-1). Drafts of the agreement between Bangor and the Piper insiders obligated Bangor to solicit those blocks (383-84A; EV 174-257). And Bangor's internal memorandum recognized that its success depended on acquiring those blocks (EV 298), which were "emotionally committed" to Chris-Craft (1836A).

† 17 C.F.R. §240.10b-6.

hibited either side from making cash purchases of those swing blocks because they had announced exchange offers to the public (C 15-18). The SEC specifically placed the parties on notice of Rule 10b-6's prohibition (A 13, 15-16). Chris-Craft obeyed the SEC. Bangor defied it. Within days of the SEC warning, Bangor paid $9,000,000 for those 7½% blocks, contrary to the advice of its own lawyers (A 16; 1645A). As a result, Bangor stated in a complaint in a related action that Chris-Craft's bid for Piper was now no longer viable. The Second Circuit *en banc* held that those cash acquisitions clearly violated Rule 10b-6 (C 15-18). In *Chris-Craft II*, the court went on to stress:

> "Even arithmetically, it is apparent that the blocks purchased in violation of Rule 10b-6 were essential to achieve control. BPC's attainment of a majority position has caused CCI to suffer a decline in the value of its Piper holdings." (A 67; *see also* A 96, 111)

Bangor Punta's and First Boston's False Prospectus

Finally, Bangor acquired another 7% of Piper's stock by a fraudulent exchange offer to Piper's public shareholders in competition with Chris-Craft's exchange offer in July. Bangor's offer stated that its railroad subsidiary (BAR) had a carrying value of $18.4 million, although Bangor was then negotiating to sell BAR for $5 to $7 million to the only interested purchaser, after a long search (A 43-45, 51-54; D 14). Bangor actually authorized the sale of BAR for $5 million four days after the control contest ended (A 44). If BAR's true value had been disclosed in the exchange offer, it would have converted Bangor's per share earnings of $3.04 reported in its prospectus (EV 38)

into a loss of $1.28 per share (D 15) and wiped out 36% of Bangor's retained earnings and 12% of the stockholders' equity (A 46; D 15). The trial court, after considering all the evidence, found the BAR omission to be materially misleading (D 15). The Second Circuit agreed that the Bangor petitioners "showed reckless disregard for the import of their activities concerning the BAR" because "[t]hey knew that the book value of the BAR set forth in the registration statement was no longer realistic" (A 47-48).

No one defends the BAR fraud in this Court. The impact of this fraud, established by the trial record, was dramatic. Chris-Craft's exchange offer attracted slightly more Piper shares than had Bangor's fraudulent offer (A 18). Thus, if disclosed, the $13,400,000 BAR loss would have been critical. The Second Circuit declared:

> ". . . BPC's offer was not so appealing, considering the BAR loss, as to have attracted any takers . . . . [I]t is clear that the 7% acquired through its exchange offer was critical to its success." (A 60)

First Boston was also found guilty of violating the anti-fraud provisions of Section 14(e) in connection with Bangor's exchange offer. It acted as the underwriter of the fraudulent offer and endorsed and distributed the prospectus to Piper's public shareholders.* Although it had read in Bangor's minutes that the board was prepared to sell BAR for $5 to $7 million (A 51-54), First Boston concealed that information and endorsed the fraudulent

* First Boston simultaneously acted as the appraiser to assure Piper's public shareholders that Bangor's package of securities was worth $80 per Piper share.

$18.4 million figure as BAR's value. The Second Circuit declared:

> ". . . First Boston's certification of the BPC registration statement carrying the BAR at $18.4 million amounted to an almost complete abdication of its responsibility to potential investors, to CCI, and to others who relied upon it to detect misrepresentations. We hold that First Boston possessed enough information reasonably to deduce that the BPC registration statement was materially inaccurate." (A 55)

The Critical Effect of Petitioners' Combined Violations

At every stage of the contest, petitioners committed flagrant violations of the securities laws—so flagrant that the SEC brought two actions against Bangor and the New York Stock Exchange initiated disciplinary proceedings against Piper. There has never been a control contest that was so close, in which one side's misbehavior was so persistent, and in which the victim's injury was so great.

Petitioners' combined violations gave Bangor an unbeatable 45%-41% lead over Chris-Craft at the close of the competing exchange offers in August. Then, with only a relatively few Piper shares remaining in public hands, Bangor was in a position to pick up majority control by purchasing only one share for every two that Chris-Craft needed—thus it could pay double the price per share that Chris-Craft could. The "scorched earth policy" had worked. The contest was over. Bangor proceeded to buy the few additional shares it needed to reach 50%.

In the absence of Bangor's unlawful acquisitions of 14½% of Piper's stock, Chris-Craft would have led by at

least 41% to 31% at the end of the exchange offers in August.* In *Chris-Craft II*, the Second Circuit stated, "CCI has shown that it had a reasonable chance of obtaining control of Piper . . ." (A 32). In the subsequent trial in *Chris-Craft III*, all the experts (including petitioners' star expert) agreed that Chris-Craft's 41%-31% lawful plurality lead in a fair contest would have been virtually insurmountable (2430-31A, 2629-30A, 2722A, 3020A).

In addition, petitioners' combined violations converted Chris-Craft's multi-million dollar investment into a virtually unsalable minority position. All experts on both sides agreed that no private purchaser would touch Chris-Craft's block "with a ten-foot pole" (3023A, 2435-36A, 2578-79A, 2633-34A, EV 1244-46; B 28).** Chris-Craft's only possible escape from its locked-in position, according to the experts on both sides, was a registered public offering of its 700,000 share block at a distress price (B 28; EV 834, 1236, 1246). The undisputed trial record demonstrated

* Chris-Craft undoubtedly would have held an even larger lead because in January, the Piper insiders dissuaded public stockholders from tendering more shares to Chris-Craft by fraudulent statements—statements which also prejudiced Chris-Craft later in the control contest when it made its exchange offer to Piper's public shareholders (A 62-63). Moreover, on the competing exchange offers in July, Chris-Craft obtained slightly more shares than Bangor; if the BAR over-valuation had been disclosed, it is unlikely that Bangor would have found any takers (A 60). Thus Chris-Craft would have obtained some, if not most, of the Piper shares tendered to Bangor.

** That is so because a potential purchaser would have been at the complete mercy of Bangor with respect to management and policy decisions. More importantly, he would also have been under the constant cloud of a merger threat by Bangor at an uncertain date selected by Bangor for its own advantage. At that time, a purchaser of Chris-Craft's block would have been forced either to accept a grab-bag of Bangor securities or to engage in a protracted and uncertain statutory appraisal proceeding—both unappealing alternatives (EV 884-85, 922).

that a public offering could not have taken place prior to January 1970 at the earliest (on assumptions most favorable to petitioners) and would have netted Chris-Craft only about $27 per share (B 29) compared to its average cost of $64 per share (B 25). Petitioners offered no evidence to the contrary.*

The Second Circuit, although recognizing that the *value* of Chris-Craft's leading plurality in a fair contest would have substantially exceeded its *cost* because the block would have carried a premium for control (B 21),** nevertheless took a conservative approach, opting for the lower *cost* figure, and calculated Chris-Craft's damages as the difference between its average cost per share ($64) and the highest price it could have obtained on a public offering at the earliest date ($27). The Second Circuit unanimously

* Instead, petitioners' principal expert Gant had simply assumed, because that was part of his assigned task from petitioners, that Chris-Craft had made a hypothetical "overnight" public offering on the very day that Bangor achieved control (September 5, 1969); and he then estimated that a public offering on that particular date would have netted Chris-Craft about $40 a share. But Gant refused to testify that a public offering was *in fact* possible in September 1969 (*see* 2822-31A); and the Second Circuit held that legal and practical requirements, established by the undisputed record, would have made a public offering impossible until January 1970 at the very earliest (B 28-29). A public offering would have required the preparation of registration material, audited financials for Piper's year ended September 30, 1969, cooperation of Bangor and the Pipers, Bangor's statement of its intentions as to a merger, and SEC approval of the registration materials (2827-31A, 2435-42A). Although Piper's audited financials were delayed until May 1970, respondent's expert and the Second Circuit assumed a public offering in January 1970—an assumption most favorable to petitioners, since the market had collapsed by May 1970 (2455-56A).

** While Chris-Craft's average cost per share of Piper was $64 (B 25-26), the trial record showed that its plurality block had a *value* of $72 per share because, as all the experts agreed, Chris-Craft would have had an overwhelming chance of success with a 41%-31% lead in a lawful contest (2430A). Indeed, Bangor paid about $80 per share in cash for the key Cornfeld block (A 16).

described this as "the minimum amount of damages that the district court could have awarded without committing reversible error" (B 25). And the court pointed out that virtually the same quantum of damages would have resulted if it had used petitioners' alternative hypothetical estimate of the price that Chris-Craft would have realized assuming *arguendo* that it could have found a private purchaser (B 31-32 n. 24).

The Second Circuit allowed pre-judgment interest, as had the District Court, but refused to award Chris-Craft consequential damages in the form of its carrying charges (more than $14 million) on its Piper investment or attorneys' fees (B 32-36). The Second Circuit also affirmed the District Court's fashioning of equitable relief, which left Bangor in *de facto* control of Piper with the right to take Chris-Craft's stock by merger at any time of its choice after 1979 (B 38-40).

Summary of Argument

Only the facts—nothing else—are unusual about this case. Bangor illegally acquired two 7% Piper blocks. Without either one, Bangor would not have 50%; without both, Chris-Craft would have held an insurmountable 41%-31% lead in the contest. The Piper insiders also frustrated Chris-Craft's chance for a fair contest by issuing fraudulent press releases; and First Boston promoted Bangor's fraudulent prospectus despite its knowledge that BAR was grossly overvalued. In short, the violations stand admitted. The injury is indisputable. The damages are a matter of mathematics. There is no issue worthy of certiorari.

Petitioners, however, claim that certiorari is now required because of this Court's recent opinions in *Blue Chip* and *Rondeau* and its decision to grant certiorari in *Hochfelder*.* We assume that petitioners, in reply, will also rely on this Court's recent grant of certiorari in *TSC*.** But far from supporting petitioners, those recent actions merely reinforce the conclusion that there is no basis for granting certiorari here.

In *Rondeau*, this Court, reversing the Seventh Circuit, insisted on a traditional showing of irreparable injury for a preliminary injunction—just as the Second Circuit did here in denying such an injunction (C 8-9). *Rondeau*, moreover, stressed that the Williams Act was designed to protect parties like Chris-Craft in control contests. 95 S.Ct. 2069, 2076.

In *Blue Chip*, this Court, reversing the Ninth Circuit, denied standing to a passive bystander, who had made no actual purchases of stock, in order to discourage "blackmail" suits—hardly a germane precedent here where Chris-Craft invested $60 million expecting a fair contest but was crippled by petitioners' violations.

In *Hochfelder*, certiorari was granted to determine whether the Seventh Circuit was correct in holding that mere negligence was adequate to replace scienter—but here

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* *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975); *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975); *Ernst & Ernst* v. *Hochfelder*, *cert. granted*, 421 U.S. 909 (1975) (Docket No. 74-1042), *reported below*, 503 F.2d 1100 (7th Cir. 1974).

** *TSC Industries, Inc.* v. *Northway, Inc.*, *cert. granted*, 44 U.S.L.W. 3180 (Oct. 6, 1975) (Docket No. 74-1471), *reported below*, 512 F.2d 324 (7th Cir. 1975).

the Second Circuit flatly rejected mere negligence and insisted on the traditional standard of actual knowledge of falsity or reckless disregard for the truth (A 35)—standards satisfied by the trial record and no longer seriously disputed by petitioners.*

And finally, in *TSC*, this Court granted certiorari to determine whether the Seventh Circuit properly decided on summary judgment the question of "materiality" as to omissions in proxy material, on the legal theory that some few stockholders "might" have regarded the omitted material as important—whereas here the court found, after a fully-litigated trial, that the $13 million BAR over-valuation, the description of Grumman's option as a $20 million obligation and the other fraudulent statements "would" have been regarded as material to stockholders.** Indeed, petitioners, who had a full opportunity to rebut those matters at trial, do not raise the issue of materiality in their certiorari petitions. Nor do they deny that they violated the anti-fraud provisions of the securities acts.

In short, there is nothing in the opinions in *Rondeau* and *Blue Chip* or the decisions to grant certiorari in *Hochfelder* and *TSC* that indicates that certiorari should be granted here. Indeed, *Chris-Craft* is the very antithesis of those cases. *Chris-Craft* applied the rigorous standards for which petitioners in those cases contend and, indeed, they cite *Chris-Craft* as support for their positions. Since petitioners here were found liable on the basis of overwhelming evidence under the strict standards imposed by the Second Cir-

* Petitioners' repeated references to the SEC's *amicus* brief in *Hochfelder*, inapposite on their face, disregard the SEC's *amicus* briefs here supporting Chris-Craft on the merits of the three appeals.

** *See, e.g.*, A 35, 38, 40-42, 45-46, 62.

cuit, they would *a fortiori* be liable under the less stringent standards being challenged in *Hochfelder* and *TSC*.

Chris-Craft does not break new ground or raise novel questions of law. It is fully consistent both with this Court's recent actions as well as its earlier landmark opinions in cases such as *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972); *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963); and *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969). The Second Circuit's widely-cited opinions here are in accord with this Court's balanced policy of encouraging legitimate private actions to enforce the securities laws (*Borak*) while, at the same time, preventing strike suits (*Blue Chip*).

Recognizing that this Court's recent actions cannot be twisted into a basis for granting certiorari, petitioners fall back on a hodge-podge of subsidiary arguments.

(1) They reargue the questions of standing, scienter and causation raised in their prior certiorari petitions—claims dismissed as "frivolous" by a unanimous Second Circuit.

(2) They feign confusion about the appropriate measure of damages. But they were on full notice of the correct damage standard and submitted their own star witness to rebut Chris-Craft's damage case. No claim is made that the Second Circuit used an incorrect legal principle in calculating damages based on an undisputed and largely documentary record.

(3) Petitioners complain about being held jointly and severally liable and blame each other in a game of musical chairs. But they were jointly and severally liable as a matter of hornbook law. Petitioners' internecine squabble about relative culpability—not properly raised on these certiorari petitions—can be resolved by petitioners themselves another day in another proceeding for contribution.

(4) Finally, First Boston seeks immunity on the theory that Section 11 of the 1933 Act shields it from liability in control contests no matter what it does. But here, First Boston was found guilty of violating not Section 11 of the 1933 Act but the more stringent anti-fraud provisions of Section 14(e) of the Williams Act. It has been well-settled law for almost a quarter of a century that persons guilty of such a violation cannot hide behind Section 11.

Acceptance of petitioners' arguments—none of which merits certiorari—would emasculate the securities laws and apply the law of the jungle to contests for control of public corporations. It would place a premium on violating the law by allowing wrongdoers to keep their booty, while denying their victims any compensation.

I

IN HOLDING PETITIONERS LIABLE, THE SECOND CIRCUIT APPLIED TRADITIONAL STANDARDS OF STANDING, SCIENTER AND CAUSATION.

Standing

1. Section 14(e)

Bangor is the only petitioner still arguing that Chris-Craft lacks standing under Section 14(e). It claims (pp. 18-20) that Chris-Craft cannot sue on account of Bangor's fraudulent exchange offer because Chris-Craft did not accept that offer and, therefore, was not a "buyer" under *Blue Chip*, and also that Chris-Craft is not among the class of persons intended to be protected by Section 14(e). Those are sham claims that raise no issue worthy of certiorari.

Bangor's reliance on *Blue Chip* is clearly misplaced. Section 14(e), unlike Rule 10b-5 involved in *Blue Chip*, does not contain a buyer-seller requirement but instead prohibits any fraudulent or manipulative act "in connection with any tender offer" or opposition thereto.* Any doubts which may have existed about the standing of tender offerors under Rule 10b-5 prior to 1968 were put to rest that year by the enactment of Section 14(e) of the Williams Act.** Bangor cites no precedent to support its argument,

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* Chris-Craft, of course, did not accept Bangor's exchange offer: it had its own simultaneous competing offer in connection with the control contest.

** *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787, 798-99 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970) (Section 14(e) "should serve to resolve any doubts about standing in the tender offer

(footnote continued on next page)

and courts and commentators agree that control contestants have standing under Section 14(e).*

In short, Section 14(e) protects *all* parties involved in a control contest. That is clear, not only from the authorities and the broad sweep of the statute, but also from its legislative history. For example, as noted in *Rondeau*, 95 S.Ct. at 2076, the House Report on the Williams Act states:

> "The bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. It is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case." H.R. Rep. No. 1711, 90th Cong. 2d Sess. 4 (1968)

The universal view that parties in Chris-Craft's position have standing under Section 14(e) follows from *J. I.*

cases . . ."); *Electronic Specialty Corp.* v. *Int'l Controls Corp.*, 409 F.2d 937, 940-41 (2d Cir. 1969) (Judge Friendly noted that Section 14(e) "applies Rule 10b-5 both to the offeror and to the opposition—very likely, except perhaps for any bearing it may have on the issue of standing, only a codification of existing case law"); *Iroquois Indust., Inc.* v. *Syracuse China Corp.*, 417 F.2d 963, 969-70 (2d Cir. 1969), *cert. denied*, 399 U.S. 909 (1970); *Mutual Shares Corp.* v. *Genesco, Inc.*, 384 F.2d 540, 544 (2d Cir. 1967).

* *See, e.g., H. K. Porter Co., Inc.* v. *Nicholson File Co.*, 482 F.2d 421, 424 (1st Cir. 1973); *Butler Aviation Int'l, Inc.* v. *Comprehensive Designers, Inc.*, 425 F.2d 842, 843 n. 1 (2d Cir. 1970); *Electronic Specialty Corp.* v. *Int'l Controls Corp., supra*, 409 F.2d at 945-46 (2d Cir. 1969); *Dyer* v. *Eastern Trust & Banking Co.*, 336 F. Supp. 890 (D. Me. 1971). *See* Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 Harv. L. Rev. 1250, 1260 (1973); Aranow & Einhorn, *Tender Offers for Corporate Control* 117-21 (1973); Binder, *Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569, 627-28 (1973); 1 Bromberg, *Securities Law: Fraud* §6.3 at 1000 *et seq.* (1974); Mundheim, *Tender Offers*, 2 Rev. of Securities Reg. 953, 956 (1969).

Case Co. v. *Borak, supra*, 377 U.S. at 429, 432, where this Court found an implied cause of action for opponents of management under Section 14(a) in proxy contests. Four years later, Congress passed Section 14(e) of the Williams Act to bring tender offers under the same legal standards of fair play as proxy contests.* There is no logic to Bangor's theory that a contestant for control has standing if he proceeds by a proxy fight rather than a tender offer.**

2. *Rule 10b-6*

Bangor claims (pp. 17-18) that Chris-Craft lacks standing under Rule 10b-6 because Chris-Craft did not purchase the key 7½% blocks for cash and thus fails to satisfy the "buyer" doctrine of *Blue Chip*. That stands *Blue Chip* on its head. Chris-Craft could have bought those shares only if it were willing to violate Rule 10b-6. It is absurd to argue that Chris-Craft lacks standing because it obeyed that rule and that Bangor is immune because it violated the rule. Since those shares were vital for control and since Bangor seized them in defiance of the SEC whereas Chris-Craft obeyed the SEC, it is difficult to imagine a stronger case for standing.

In addition, as noted above, Chris-Craft clearly has standing under Section 14(e). That section prohibits any

* *E.g.*, S. Rep. No. 550, 90th Cong. 1st Sess. 2 (1967). *See Electronic Specialty Co.* v. *Int'l Controls Corp., supra*, 409 F.2d at 945; *Dyer* v. *Eastern Trust & Banking Co., supra*, 336 F. Supp. at 907.

** Bangor's reliance (pp. 18-20) on *Rondeau* and *Cort* v. *Ash*, 422 U.S. 66 (1975), for its standing argument backfires. *Rondeau* specifically emphasizes that the Williams Act was designed to protect parties like Chris-Craft making tender offers as well as management of the target company, 95 S.Ct. at 2076; and *Cort*, repeatedly citing *Borak*, stresses that a private cause of action for damages is properly implied to enforce the anti-fraud provisions of the securities acts, including Section 14. 95 S.Ct. 2080, 2088 and n. 11, 2090, 2091.

"fraudulent, deceptive, or manipulative acts" in connection with control contests. Violations of Rule 10b-6 are "manipulative acts" covered by Section 14(e).* That furnishes an additional basis for Chris-Craft's standing.

In sum, *Blue Chip* is designed to discourage strike suits by third parties who speculate in court without having committed themselves in the marketplace. But here, Chris-Craft spent millions of dollars buying Piper shares in the expectation of a fair race. Its investment was destroyed by petitioners' violations aimed at Chris-Craft. Standing is clear.

Scienter

Bangor is the only petitioner still claiming (pp. 20-24) that it did not act with scienter and that the Second Circuit somehow eliminated the scienter requirement. Those spurious claims hardly merit reply. The Court in *Chris-Craft II* clearly insisted on scienter, which it defined as "knowledge of falsity or reckless disregard for the truth"; it stated that mere negligence is not enough (A 35, 96, 105-106). The formulation of scienter in *Chris-Craft* is as strict as that required in any other circuit.**

* Indeed, Rule 10b-6 begins with the words, "It shall constitute a 'manipulative or deceptive device or contrivance' . . ." 17 C.F.R. §240.10b-6.

** *See, e.g., Sargent* v. *Genesco, Inc.*, 492 F.2d 750, 761 (5th Cir. 1974); *Rochez Bros., Inc.* v. *Rhoades*, 491 F.2d 402, 407 (3d Cir. 1974); *SEC* v. *Coffey*, 493 F.2d 1304 (6th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975); *Clegg* v. *Conk*, 507 F.2d 1351, 1362 (10th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3659 (June 16, 1975). Bangor argues (p. 23) that Judge Friendly in *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1301 n. 20 (2d Cir. 1973), indicated that *Chris-Craft* eliminates scienter. On the contrary, Judge Friendly specifically recognized Chris-Craft's "recent holding . . . that scienter must be proved in a private action under section 14(e) . . ." *Id.* at 1299 n. 17.

There is no merit to Bangor's contention (pp. 20-21) that this Court's grant of certiorari in *Hochfelder, supra,* requires similar action here. The issue in *Hochfelder* is whether mere negligence by an accounting firm will support liability for securities fraud. But, as noted, the Second Circuit here demanded actual knowledge of falsity or reckless disregard for the truth (A 35).* Here, there is overwhelming culpability no matter how scienter is defined.

Finally, Bangor suggests (p. 21) that it violated Section 14(e) and Rule 10b-6 "in reasonable reliance upon the unanimous opinion of expert legal and accounting advisers." That is a false factual claim. Bangor purchased the 7½% blocks for cash in *defiance* of its own lawyers' advice, several days after the SEC's warning (1645A); and the Second Circuit held that the Bangor petitioners actually "knew that the book value of the BAR set forth in the registration statement was no longer realistic" (A 48),** a fact confirmed by their authorization of its sale for a $13,400,000 loss four days after the close of the control contest (A 44).

Causation

Petitioners argue, as in their prior certiorari petitions, that the Second Circuit eliminated the causation requirement and misapplied *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) and *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972). Those claims, lacking in merit, surely

* In fact, the auditors in *Hochfelder* cite *Chris-Craft II* as one of the many cases requiring strict proof of scienter. *See* Petition for Certiorari in *Ernst & Ernst* v. *Hochfelder, supra,* at 10-11 n.; Petitioners' Brief at 52-53 n. **.

** *See also* D 6, 13-14.

do not present an issue for certiorari here. In the unique factual setting of this case, causation was not problematical. It was a mathematical certainty.

1. Bangor made illegal cash purchases of 7½% of Piper's stock in violation of Rule 10b-6.

2. Bangor obtained an additional 7% of Piper's stock by a fraudulent exchange offer.

3. Without either block, Bangor would lack its 50% majority.

4. Without both blocks, Chris-Craft would have led by at least 41%-31% at the end of the competing exchange offers, and could not have been overtaken, according to experts on both sides.

5. In fact, Chris-Craft would have had an even larger lead because, as the Second Circuit pointed out, the Piper insiders dissuaded Piper's public shareholders from tendering more shares to Chris-Craft throughout the contest (A 62).

Thus, causation was established here under any standard. Petitioners could not overcome the undisputed statistics establishing causation after trial. This was not a summary judgment case like *TSC* where a court had to engage in speculation. Because Bangor concededly gained 50% control by unlawful transactions and thereby destroyed Chris-Craft's investment, causation is far clearer here than in *Mills, Ute* or their progeny.

With respect to Bangor's acquisition of 7% of Piper's stock by its fraudulent exchange offer, petitioners claim that the Second Circuit should have ignored *Mills* and *Ute*

because it was Piper's public stockholders, rather than Chris-Craft, who relied on the false BAR value. But, as the Second Circuit noted in its often-cited opinion in *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787, 796 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970):

> "When Crane entered the securities market with its tender offer, it was entitled to the Act's protection not only against being deceived itself but also against deception of the investing public designed to prevent the public from entering into securities transactions."

The elementary principle enunciated in *Crane* is well-established law that requires no review by this Court.* Indeed, as shown above at p. 20, the very purpose of Section 14(e) is to protect against acts which dupe stockholders into siding with the wrongdoer in control contests.

Bangor illogically argues (p. 26) that its unlawful acquisition of 14½% of Piper stock is wholly irrelevant because Chris-Craft theoretically could nonetheless have won control at the end of the competing exchange offers and that Bangor really achieved control when it purchased 5% of Piper's stock in August. But it is nonsense to ignore the illegal 14½% and consider only the 5%. Moreover, with Bangor's illegal 45%-41% lead in August, all the

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* *See, e.g., Herbst* v. *Int'l Telephone & Telegraph Co.*, 495 F.2d 1308, 1315-16 (2d Cir. 1974); *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627, 635 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967); *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972); *Union Pacific R.R. Co.* v. *Chicago & North Western Ry. Co.*, 226 F. Supp. 400 (N.D. Ill. 1964), cited with approval in *Mills, supra*, 396 U.S. at 385. As explained by the Second Circuit, the fact that petitioners deceived large numbers of Piper shareholders in order to discourage them from dealing with Chris-Craft makes application of the *Mills-Ute* test particularly appropriate (A 59).

experts agreed that it was realistically in an unbeatable position. Conversely, in the absence of Bangor's illegal acquisitions, victory would have been a practical certainty for Chris-Craft, according to experts on both sides. Those undisputed factual issues, fully litigated, create no issue for certiorari.

Finally, the Piper insiders claim (p. 12) that their fraudulent statements in January could not have injured Chris-Craft because the contest was not definitely decided until a number of months later. But those false statements, as the Second Circuit specifically found, not only discouraged Piper's shareholders from tendering more stock in response to Chris-Craft's cash tender offer in January, but also had a continuing adverse impact on Chris-Craft's later exchange offer to Piper's shareholders (A 62-63). Again, this is a litigated factual issue not worthy of certiorari.

Petitioners' mishmash of causation arguments, when stripped of their verbiage, boil down to speculation that they *might* have won control even if they had not cheated, and that Chris-Craft, despite its commanding lawful plurality in an honest battle, must prove that it *definitely* would have won if petitioners had obeyed the law. Such a cynical argument, seeking to resolve all remote speculation in favor of the wrongdoer and against his victim, reverses this Court's rationale in *Mills* and *Ute*. Moreover, it offends the cardinal principle recognized in *Bigelow* v. *R.K.O. Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946). There the defendants claimed immunity on the theory that the plaintiff had not established that it *definitely* would have been better off under the conditions that *might* have prevailed

in a marketplace not affected by defendants' antitrust violations. In rejecting that contention, this Court declared:

> "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.
>
> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created. See *Package Closure Corp.* v. *Sealright Co.*, 141 F.2d 972, 979. That principle is an ancient one, *Armory* v. *Delamirie*, 1 Strange 505, and is not restricted to proof of damage in antitrust suits. . . ." *Id.*

There is no genuine question as to causation here, much less a novel or disputed principle of general application that calls for certiorari.* The facts make this a *sui generis* case of overwhelming causation under any standard.

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* There is no merit to claims by Bangor (p. 26) and the Pipers (p. 13) that *Rochez Bros., Inc.* v. *Rhoades*, 491 F.2d 402 (3rd Cir. 1974) and *Carras* v. *Burns*, 516 F.2d 251 (4th Cir. 1975), are in conflict with *Chris-Craft* because those cases considered evidence to rebut the *Mills-Ute* presumption. Those cases involved face-to-face transactions, which do not present the problems of proving the reactions of thousands of stockholders that the *Mills* presumption was designed to avoid. In any event, assuming *arguendo* that the presumption of reliance is rebuttable, petitioners here had ample opportunity to attempt such rebuttal at trial, but they failed.

II

ALL PETITIONERS WERE CORRECTLY HELD JOINTLY AND SEVERALLY LIABLE.

The Second Circuit held petitioners jointly and severally liable because "the conduct of each of the petitioners, through their violation of the securities laws, contributed to the success of BPC's takeover attempt . . ." (A. 69, B 4). The Piper insiders (pp. 15-18) and First Boston (p. 12) now argue that they should not be jointly and severally liable but that instead damages should be apportioned according to each petitioner's relative culpability. This hardly merits certiorari. It is hornbook law that individual tortfeasors whose combined misdeeds contribute to an indivisible injury (here, converting Chris-Craft's block from a control opportunity into an unsalable minority) are jointly and severally liable, especially when they cooperate in a campaign against their victim.

For example, Dean Prosser states:

> "Where two or more causes combine to produce . . . a single result, incapable of any logical division, each may be a substantial factor in bringing about the loss, and if so, each must be charged with all of it. . . . The duties which are owed to the plaintiff by defendants are separate, and may not be identical in character or scope, but entire liability rests upon the obvious fact that each has contributed to the single result, and that no rational division can be made." Prosser, *Law of Torts* 315-16 (4th ed. 1971) (footnotes omitted)*

* Similarly, this Court has held that where the misdeeds of two defendants concur to cause a single harm, joint and several liability

Prosser gives this example: if two defendants separately shoot a victim and he dies from the effect of both wounds, liability cannot logically be divided, and each defendant will be held liable for the whole loss. Here, all petitioners shot at Chris-Craft and hit the bulls-eye.

The traditional rule discussed by Dean Prosser is also hornbook law in the securities field. Thus, Professor Loss notes:

> "When a number of defendants have participated in a scheme that would have collapsed if any of the defendants had made the disclosure required by Rule 10b-5, there is no way to apportion guilt. Under these conditions, it is appropriate to apply the principle that each joint tortfeasor is liable for the full amount of damages. Ross v. Licht, 263 F. Supp. 305, 411 (S.D. N.Y. 1967), citing Restatement of Torts §§875-76." VI Loss, *Securities Regulation* 3924 (Supp. to 2d ed. 1969).

The time-honored legal principles of joint and several liability require no grant of certiorari here.

Nor need the Court review the application of those ancient legal principles to the particular facts here. There is no dispute that the Pipers initiated the campaign against Chris-Craft, issued fraudulent statements that adversely affected it from start to finish and recruited First Boston and Bangor. By the same token, First Boston—involved throughout the campaign—delivered the final blow by promoting the fraudulent Bangor prospectus while on notice

is required. *Miller* v. *Union Pacific R.R. Co.*, 290 U.S. 227, 236 (1933); *Aro Mfg. Co., Inc.* v. *Convertible Top Replacement Co., Inc.*, 377 U.S. 476, 500-01 (1964). *See also*, 1 Harper & James, *Law of Torts* §10.1 at 692-93, 697-98 (1956); *Michie* v. *Great Lakes Steel Division, National Steel Corp.*, 495 F.2d 213, 217-18 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974), relied on by the Pipers (p. 17 n. **).

of its falsity. These were not mere strangers striking the same victim by mere chance. Petitioners, all with substantial stakes in the success of the campaign against Chris-Craft,* are jointly and severally liable under conventional legal principles.**

The Pipers' final claim (p. 17) that damages should be apportioned is not properly raised on this certiorari peti-

* The Pipers sold their shares to Bangor for almost $35 million in Bangor securities and also had a $13 million contingent bonus (A 14, 40). First Boston, contrary to the implication in its petition (p. 12), had substantial financial interests in the campaign against Chris-Craft. Wholly apart from acting as underwriter for Bangor's false prospectus, First Boston was the paid investment adviser to the Pipers and to Bangor over a period of almost a year. Bangor agreed to pay First Boston "an amount not yet determined" (EV 35) if it obtained control of Piper. Although never publicly revealed, the amount is of sufficient magnitude to warrant a separate notation in Bangor's and Piper's financials. *See, e.g.*, Bangor's Annual Report for 1973, Financials, p. 20; EV 1026.

** There is similarly no merit to the Pipers' alternative claim (pp. 15-18) that they can somehow escape liability because the other petitioners were supervening causes who delivered the knockout blow several months after the Pipers' original kidney punches. The law on this point, also well-settled, does not call for certiorari. The doctrine of "intervening" cause in the negligence cases cited by the Pipers (p. 16) does not apply to these intentional misdeeds, because the Pipers brought the other wrongdoers into the plan against Chris-Craft and because the Pipers' fraudulent public statements had a continuing adverse impact on Chris-Craft throughout the contest (*i.e.*, every time it attempted to attract Piper stockholders). *See, e.g., Freeman* v. *United States*, 509 F.2d 626, 633-34 (6th Cir. 1975); *Lopez* v. *Southern Pacific Co.*, 499 F.2d 767, 772 (10th Cir. 1974); *Michael* v *United States*, 338 F.2d 219, 220-21 (6th Cir. 1964). The last case, cited by the Pipers (p. 16 n. **), states:

> "We recognize the rule that the negligent act need not be the final and immediate cause but may be actionable if it is a cause concurring with other negligence in proximately bringing about the charged injury." 338 F.2d at 221.

If mere negligence with a continuing effect overcomes claims of "supervening cause," surely the repeated willful violations by the Pipers —which the Second Circuit held had a continuous adverse impact on Chris-Craft (A 62)—are sufficient for liability.

tion. While the Pipers' pre-trial brief in *Chris-Craft III** stated that if damages were awarded "with all defendants jointly and severally liable," the trial court "at an appropriate stage thereafter . . . should determine the rights and liabilities of the defendants to each other . . . ," the Pipers never pressed that request nor made cross-complaints against the other petitioners. Now, however, they as well as First Boston are free to pursue a contribution proceeding, where each petitioner can seek to lay blame at the other's doorstep. Once again, that involves settled legal principles:

> "[T]he plaintiff's right to recover for his harm should not depend on his ability to apportion the damage. . . . [T]his is a problem which is properly left with the defendants themselves." 1 Harper & James, *supra*, §10.1 at 702**

III

THERE IS NO MERIT TO FIRST BOSTON'S CLAIM OF IMMUNITY UNDER THE 1933 ACT.

First Boston's principal—indeed, virtually its sole—claim is that it is immune from liability because of the special limitations for underwriters in Section 11 of the 1933 Act.† But, contrary to the pivotal assumption of its

* Feb. 28, 1974, p. 2 n.

** Thus, in *Globus, Inc.* v. *Law Research Service, Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1346 (2d Cir.) (*per curiam*), *cert. denied*, 404 U.S. 941 (1971), Judge Frankel allowed contribution on the post-judgment motion of Blair & Co. after the plaintiff's judgment had been paid in full by the underwriter. *See also, Gould* v. *American-Hawaiian Steamship Co.*, 387 F. Supp. 163 (D. Del. 1974) (contribution allowable to less culpable tortfeasor from jointly and severally liable co-defendants after he had paid more than his fair share of the judgment).

† 15 U.S.C. §77k.

petition, First Boston was not held liable under Section 11 of the 1933 Act for mere negligence (*i.e.*, for failing to discharge its "due diligence" duty). Rather, it was found liable under the antifraud provisions of Section 14(e) of the 1934 Act because it was on notice that Bangor's registration statement was false. The Second Circuit was crystal clear on that point (A 51-55, 116-17, B 10). And the law is equally clear that an underwriter found guilty of violating one of the antifraud provisions of the securities laws is not shielded by Section 11. That has been the law for a quarter of a century.

The leading opinion, *Fischman* v. *Raytheon Manufacturing Co.*, 188 F.2d 783 (2d Cir. 1951), was written by Judge Jerome Frank, formerly Chairman of the SEC. In *Fischman*, the Second Circuit held that when a fraudulent prospectus for preferred stock also had the effect of misleading holders of common stock, they had standing to sue under the antifraud provisions of Section 10(b)—the model for Section 14(e)—although they had no standing under Section 11. Judge Frank declared: "Were this not true, Section 11 of the 1933 Act, designed to protect investors even when there is no fraud, would afford a shelter or sanctuary for those who defraud investors." *Id.* at 787. Since *Fischman*, this rule has been adopted in the numerous cases which considered the question.*

* *See, e.g., Newman* v. *Prior*, 518 F.2d 97, 99 (4th Cir. 1975); *Lanza* v. *Drexel & Co.*, 479 F.2d 1277, 1299 (2d Cir. 1973) (*en banc*); *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F.2d 123, 125 and n. 3 (7th Cir. 1972); *Donlon Indust., Inc.* v. *Forte*, 402 F.2d 935, 936 n. 2 (2d Cir. 1968) (Friendly, J.); *Jordan Building Corp.* v. *Doyle, O'Connor & Co., Inc.*, 401 F.2d 47, 49-51 (7th Cir. 1968); *McClure* v. *Borne Chemical Co., Inc.*, 292 F.2d 824, 836-37 (3d Cir.), *cert. denied*, 368 U.S. 939 (1961); *Ellis* v. *Carter*, 291 F.2d 270, 272-74 (9th Cir. 1961); *Matheson* v. *Armbrust*, 284 F.2d 670, 674-75 (9th Cir. 1960), *cert. denied*, 365 U.S. 870 (1961); and *see* (re damages), *Grossman, Faber & Miller, P.A.* v. *Cable Funding Corp.*, [1974-75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶94,913 at 97,120-21 (D. Del. 1974); *Benzoni* v. *Greve* [1974-75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶94,912 at 97,112 n. 7 (S.D.N.Y. 1974); *Unicorn Field, Inc.* v. *Cannon Group, Inc.*, 60 F.R.D. 217, 226-27 (S.D.N.Y. 1973).

Indeed, First Boston's original trial memorandum* adopted the *Fischman* rationale:

> "Chris-Craft . . . admits it is not entitled to sue under the 1933 Act. To have standing thereunder, a plaintiff must have purchased securities offered by the prospectus. The distinction between what must be proven under the 1934 Act as against the 1933 Act has long been recognized. In *Fishman* [sic] v. *Raytheon, supra,* Judge Frank laid down the rule that a plaintiff without standing under the 1933 Act must prove the additional element of fraud to recover under Rule 10b-5."

First Boston has thus provided a full reply to its own certiorari petition.

First Boston's new theory, if accepted, would lead to the anomalous result that an underwriter who issues a false press release is liable for full compensatory damages, whereas one who issues a false prospectus—a more solemn and important document—would be entitled to the benefit of limited liability under Section 11(e). In effect, First Boston seeks to make bankers a privileged class. But *Chris-Craft* emphasized that the very stature of this underwriter gave it greater clout to cause harm because of public reliance on its prestigious name (A 50-51). Investment bank-

* March 4, 1971, at 19-20.

ers and underwriters, like lawyers, accountants and ordinary citizens, have been held liable under antifraud provisions in many cases.* As Judge Friendly has stated:

> "In our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar." *United States* v. *Benjamin*, 328 F.2d 854, 863 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964).

Investment bankers can wield the same "chisel or crowbar." Here, First Boston did.

IV

IN CALCULATING THE MINIMUM MEASURE OF DAMAGES, THE SECOND CIRCUIT APPLIED TRADITIONAL AND CONSERVATIVE LEGAL STANDARDS TO UNDISPUTED FACTS.

Bangor and the Pipers focus their principal attack on the quantum of damages. But the unanimous Second Circuit emphasized that the award was "the minimum amount of damages that the district court could have awarded without committing reversible error" (B 25). And it added: "Approximately the same award of damages would result if we were to accept Gant's [petitioners' expert's]

* *See, e.g., Globus* v. *Law Research Service, Inc.*, 418 F.2d 1276, 1289 (2d Cir.), *cert. denied*, 397 U.S. 913 (1970); *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228, 231, 241 (2d Cir. 1974); *Herbst* v. *Int'l Telephone & Telegraph Corp.*, 495 F.2d 750, 761 (5th Cir. 1974); *Sargent* v. *Genesco, Inc.*, 492 F.2d 750, 761 (5th Cir. 1974); *Jordan Building Corp.* v. *Doyle, O'Connor & Co.*, 401 F.2d 47 (7th Cir. 1968). *See also In re Penn Central Commercial Paper Litigation*, 61 F.R.D. 453 (S.D.N.Y. 1973); *Dorfman* v. *First Boston Corp.*, 336 F. Supp. 1089 (E.D. Pa. 1972).

testimony regarding a private placement of CCI's 42% minority interest" (B 31 n. 24). On the damage issue, petitioners do not raise a single legal issue worthy of certiorari. They do not challenge the standard used by the Second Circuit nor its application to the undisputed and largely documentary record (B 23). In effect, they ask this Court for a chance to re-try the damage issue.

Petitioners Have Had Their Day in Court

Bangor (pp. 30-33) and the Piper insiders (pp. 20, 22) now pretend that they were confused by *Chris-Craft II's* statements as to the nature of Chris-Craft's damages and therefore did not put their best foot forward at the damage trial in *Chris-Craft III*. That is nonsense. In *Chris-Craft II*, the Second Circuit repeatedly stressed the scope of Chris-Craft's enormous loss, emphasizing that Chris-Craft had suffered a significant decline in the value of its multi-million dollar Piper investment for which it was to receive compensatory damages (A 60, 66-67, 68-69, 111, 124, B 18-19).

Prior to the actual damage trial in *Chris-Craft III*, Chris-Craft announced in its pre-trial briefs and in the proposed joint pre-trial order that its proof would be based on the difference between (a) the cost (or higher value) of its Piper block *prior* to petitioners' violations and (b) the value of that block *after* Bangor's illegal seizure of control. Far from being confused, petitioners discussed that theory at length in their own pre-trial briefs. And at the trial itself, Chris-Craft presented evidence to support its damage theory in the form of written reports by experts (ex-

changed in advance of trial) plus live testimony essentially tracking those reports (B 23). Petitioners offered their own evidence to rebut Chris-Craft's damage case. Their star expert Gant was specifically put on the stand for that very purpose.

The Second Circuit in *Chris-Craft III* calculated the decline in the value of Chris-Craft's holdings attributable to petitioners' violations according to the trial evidence which, it noted, was largely documentary and uncontroverted as to the pertinent facts (B 22-23, 30). On the basis of the undisputed record, the Second Circuit applied well-established legal theories in calculating damages.* Defendants do not attack the court's legal standard of damages. They do not suggest an alternate legal theory. They do not raise an issue worthy of certiorari—just an inappropriate request for a third trial.**

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* *Chasins* v. *Smith, Barney & Co.*, 438 F.2d 1167, 1173 (2d Cir. 1970); *Esplin* v. *Hirschi*, 402 F.2d 94, 104-05 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969); *Janigan* v. *Taylor*, 344 F.2d 781 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965).

** At the damage trial in *Chris-Craft III*, petitioners had advanced their own erroneous theory of damages as well as attempting to meet Chris-Craft's evidence. At the damage trial, petitioners noted that *Chris-Craft II* at one point had referred to a reduction in "appraisal value"—a term which they hypothesized must have meant the value of a 100-share block in a state statutory appraisal proceeding commenced by a minority stockholder of Piper who dissented to a merger between Bangor and Piper. That bizarre theory, which had absolutely nothing to do with the factual setting in this case, naturally produced zero damages because it measured the intrinsic value of 100 shares of Piper the minute before and the minute after Bangor's seizure of control. But nobody reading *Chris-Craft II* could have seriously believed that the Second Circuit had meant to say that Chris-Craft had suffered no damages. The Second Circuit, of course, refused to accept the "zero damage" theory in *Chris-Craft III* (B 19-20). The fact that

Petitioners' Miscellaneous Damage Claims

(1) There is no merit to Bangor's (pp. 29-33) and the Pipers' (pp. 20-22) challenge to the Second Circuit's power to fix damages rather than to remand, under 28 U.S.C. §2106, particularly because here there was an undisputed record on the key facts and the district judge had twice defied the Second Circuit's mandates in a litigation which had dragged on for six years while Chris-Craft continued to suffer grievous injury (B 23-24, 25, 30).*

(2) Bangor (pp. 27-28) and the Pipers (pp. 20-21) argue that in calculating damages the Second Circuit should not, as a matter of law, have used either: (a) Chris-Craft's cost as the *upside figure* because that cost reflected the inflationary impact of the control contest; or (b) the resale value of Chris-Craft's block in a public offering in January 1970 as the *downside figure* because that reflected a market decline in the period after Bangor's seizure of control in September 1969. But actual costs are the best index of value—a fundamental rule articulated in leading opinions by Justice Cardozo and Judge Learned Hand cited by the

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petitioners tried to foist that specious theory on the trial court is surely no ground for now giving petitioners a second damage trial, particularly since they also *did* present evidence on the correct damage theory at the trial in *Chris-Craft III*. And their own evidence on the correct damage theory, as noted by the Second Circuit (B 31 n. 24), yielded virtually the same quantum of damages as calculated by the appellate court in *Chris-Craft III*.

* *See, e.g., Georgia-Pacific Corp.* v. *U.S. Plywood-Champion Papers, Inc.*, 446 F.2d 295, 299-300 (2d Cir.), *cert. denied*, 404 U.S. 870 (1971); *Petition of United States Steel Corp.*, 479 F.2d 489, 500-01 (6th Cir.), *cert. denied*, 414 U.S. 859 (1973); *Oil Screw Noah's Ark* v. *Bentley & Felton Corp.*, 322 F.2d 3, 9 (5th Cir. 1963); *Texas Co.* v. *R. O'Brien & Co.*, 242 F.2d 526, 529 (1st Cir. 1957); *Smith* v. *Dravo Corp.*, 208 F.2d 388, 391 (7th Cir. 1953); and *see* 9 Wright & Miller, *Federal Practice & Procedure* §2577 at 699-701 (1971).

Second Circuit (B 22 and n. 15). And while the market did decline between September 1969 and January 1970, it is undisputed on the trial record that the latter date was the first feasible time when Chris-Craft could have sold its block via a registered public offering, on assumptions most favorable to petitioners (*see* p. 13 and n. *, *supra*). Chris-Craft was, in effect, locked into its Piper investment until that time. That was not its fault. It was petitioners' fault. Wrongdoers, not their victims, bear risks created by their misdeeds under the traditional doctrine articulated in *Bigelow*.*

(3) Bangor claims (p. 5) that the damage award injures Piper shareholders who tendered Piper stock to it six years ago. But it cannot hide behind them. The relatively few former Piper public shareholders who still own Bangor stock six years after the control contest now have a right to rescind (A 89-92). Moreover, a denial of damages to Chris-Craft would injure the greater number of Piper shareholders who tendered to Chris-Craft, as well as Chris-Craft's thousands of other innocent shareholders.

* In a similar vein, Bangor speculates (p. 28) that *perhaps* Chris-Craft would have suffered the same injury if it had obtained control, because of the stock market decline. But, having deprived Chris-Craft of control by illegal means, Bangor cannot now ask this Court to accept its speculative assumptions that a majority block is worth no more than a minority (particularly since Bangor refused to switch positions with Chris-Craft) (2995A); or that Chris-Craft, if it had control, would have managed the affairs of Piper just as ineffectively as Bangor did; or that Chris-Craft might not, as the District Court believed (B 61), have sold its majority position before the market decline; or that Chris-Craft might not have, as Bangor allegedly feared, merged Piper into Chris-Craft. In effect, Bangor asks this Court to reverse the rule that uncertainties are resolved in favor of victims, not wrongdoers, under *Bigelow*, *Mills* and *Ute*. Again, Bangor raises bogus issues and matters that are not appropriate for certiorari.

(4) Finally, Bangor (pp. 13, 33) objects to the award of pre-judgment interest in view of the increased amount of the damages. But the trial judge awarded interest, and the Second Circuit affirmed, fully explaining the rationale for exercising discretion to award pre-judgment interest in this protracted six-year litigation (B 33).

In summary, on the damage issue, petitioners cannot point to any unsettled legal principle of broad application or a split among circuits worthy of certiorari. Their real grievance is not a legal one at all. They simply object to the size of the damage award. That is not a matter for certiorari. If the damages are substantial, that is because petitioners played for high stakes and caused massive injury. The damages, in fact, are the "minimum" amount that could have been awarded according to the Second Circuit and do not even fully compensate Chris-Craft for the crippling blow which it suffered.

V

PETITIONERS' PARADE OF IMAGINARY HORRORS DOES NOT WARRANT CERTIORARI.

Because there are no genuine legal issues that come close to warranting a grant of certiorari, petitioners raise an assortment of emotional pleas as a last resort. For example:

—The damages are large relative to petitioners' individual resources.

—Worthwhile take-over bids will be discouraged.

—Wall Street bankers will shun control contests.

—The opinions will open the floodgate to thousands of suits.

But if the damages are 'arge on an absolute basis, Chris-Craft's injuries were far arger.*

The contention that the *Chris-Craft* opinions may discourage tender offers, not borne out by facts, is illogical on its face. Chris-Craft, after all, was the initial tenderor that obeyed the law at all times—and was defeated by petitioners' illegal acts. If the wrongdoers escape, that indeed would discourage *legitimate* tender offers.

Pleas of special treatment for investment bankers come with particular ill grace. *See SEC* v. *Capital Gains Research Bureau, Inc., supra,* 375 U.S. at 186-87 (1963). Confidence in the capital markets cannot be restored if investment bankers are given *carte blanche* to violate the laws.

Finally, the notion that the opinions will stimulate an avalanche of "vexatious" litigation was recently refuted by Judge Weinfeld.** After repeatedly relying on the Second Circuit's rigorous standards in *Chris-Craft II*, he dismissed

* Moreover, although irrelevant, the actual impact on the lawbreakers will be substantially mitigated by tax deductibility, insurance and contribution. For example, there is a hollow ring to First Boston's present claim (p. 12) that the judgment represents a significant share of its net worth. In contrast, First Boston's Chairman recently announced on the Dow Jones broad tape that, even in the event that it paid the entire judgment itself, the net after-tax effect would be $16 million, which "would not impair the ability of First Boston to conduct its operations successfully" (April 15, 1975). That, of course, ignores all prospects of contribution. Moreover, First Boston's financial stake in Chris-Craft's defeat, contrary to its petition (p. 12), far exceeded the amount of its registration fee (*see* p. 30, n.*, *supra*).

** *Spielman* v. *General Host Corp.*, [Current] CCH Fed. Sec. L. Rep. ¶95,267 at 98,368 (S.D.N.Y. 1975). *See also, Beecher* v. *Able*, [Current] CCH Fed. Sec. L. Rep. ¶95,303 (S.D.N.Y. 1975).

an attack on an exchange offer, concluding that control contests have not become "a minefield in which the slightest misstep means substantial liability." Here, there were not slight missteps but gross violations.

Petitioners' potpourri of emotional arguments and pleas for special status—all contrary to public policy and ethical dealing in the marketplace—highlight the absence of any genuine issues meriting certiorari.

CONCLUSION

Six years have passed since petitioners crippled Chris-Craft by their repeated violations of law, which now stand admitted. At long last, Chris-Craft should receive compensation for its grievous injury. The petitions for certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

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REPLY BRIEF FOR PETITIONERS HOWARD PIPER, THOMAS F. PIPER AND WILLIAM T. PIPER, JR.

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To the extent that Chris-Craft's Brief in Opposition even deals with the Piper individuals, it distorts the facts, wholly misstates their position and fails to address the legal issues raised in the Petition for Certiorari.* Chris-Craft, by rhetoric, tries to cloud the fact that important questions have been raised which require resolution by this Court.

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* Contrary to Chris-Craft's assertions (Brief, pp. 3, 14), the Piper individuals do not admit they violated Section 14(e) of the 1934 Act. Nor have they abandoned their positions with respect to Chris-Craft's lack of standing and the improper elimination of a requirement of scienter (Brief, pp. 19, 22). The Piper individuals concur with Bangor Punta's Petition but, in order to avoid needless repetition, do not believe it appropriate to reiterate those issues.

Causation

Chris-Craft's Brief ignores the improper standards of causation applied by the Court below. It pretends that the parties litigated and the courts below made findings of causation in fact, rather than making a series of unjustifiable presumptions (a word never mentioned by Chris-Craft) as the Court of Appeals did.

The essential causal connection between the Piper individuals' alleged misrepresentations in January and Chris-Craft's alleged injury when it lost the opportunity to gain control in September was never proven, litigated or even briefed. Nevertheless, the Piper individuals were held liable for the staggering judgment of $36 million, an amount not once mentioned in Chris-Craft's Brief.

By calling the issue of causation "a mathematical certainty" (Brief, p. 24) Chris-Craft attempts to convert a series of presumptions indulged in by the Court of Appeals into findings of fact.

Among the Court of Appeals' presumptions were that the Piper shareholders (1) relied on the alleged misrepresentations in the January communications and (2) presumably did not tender to Chris-Craft. Contrary to Chris-Craft's suggestion, the Piper individuals did not have "ample opportunity" to rebut those presumptions (Brief, p. 27, fn.). The issue was never litigated; in the trial court the Piper individuals established, and the trial court held, that there were no misrepresentations. When the Court of Appeals reversed, it rejected the obvious alternatives noted by this Court in *Blue Chip**—shareholders may not have tendered for reasons unrelated to the alleged misrepresentations—and presumed reliance without hearing or allowing any evidence in rebuttal.

Chris-Craft similarly misstates the Court of Appeals' standard of materiality as applied to the January com-

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* *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975).

munications (an issue raised in the *TSC* case recently accepted for review by this Court*). The Second Circuit did not find, as Chris-Craft argues, that the Piper shareholders "would" have regarded the alleged misstatements as material (Brief, p. 16), but rather presumed that (1) a reasonable shareholder *"would assume"* that calling the tender offer "inadequate" referred solely to price and not to the limited nature of the offer (A-38) and (2) not describing the so-called Grumman put *"was likely to affect* the attitude of Piper shareholders toward [Chris-Craft's] tender offer" (A-40) (emphasis supplied).

Chris-Craft also distorts the facts to support its presumed injury. It casually states it was seeking 300,000 "or more" shares on its tender offer, and goes so far as to imply that it would have purchased all shares in public hands (Brief, pp. 5, 6).** The trial court found that Chris-Craft could not have bought substantially more than the 300,000 shares it originally sought and actually purchased (A-113). The Court of Appeals did not make a finding that Chris-Craft would have bought more; it simply stated that "it appears" that the financing for the purchase of additional shares for cash in January "was available" and then made what it said was "a reasonable presumption" that in January Chris-Craft "was unlawfully denied the opportunity to purchase additional shares" (A-61-62).

In an effort to close the causal gap between the January and September events, Chris-Craft refers to the additional consideration to be received by all members of "the Piper family" in connection with Bangor Punta's exchange

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* *TSC Industries, Inc.* v. *Northway, Inc.*, cert. granted 44 U.S.L.W. 3180 (Oct. 6, 1975) (Docket No. 74-1471).

** Chris-Craft, which now suggests it would have purchased 900,000 shares for cash, made no effort to buy any additional shares after the tender offer closed (1340A). Indeed, Chris-Craft became concerned during the course of the tender offer since it was in no position to purchase more shares, that it might get the whole Piper company "dumped" in its lap (1335A).

offer.* Contrary to Chris-Craft's statement, the matter was not "concealed;" in fact, Chris-Craft stipulated in the trial court that the provisions for additional consideration were described in Bangor Punta's preliminary registration statement in May and its final Prospectus in July (426A, 428A-430A). More significantly, the Court of Appeals held that Chris-Craft was not injured as a result of alleged non-disclosure of the additional consideration provisions (a finding Chris-Craft buries in a footnote) (Brief, p. 8 fn.).

Hence, a central issue on causation, which Chris-Craft never addresses, is whether the court could properly *presume* for the first time on appeal that the January communications had a "continuing adverse effect" on Chris-Craft's later exchange offer for Piper shares (A-62)—a conclusion described by the dissenting judge in the Court of Appeals as a "fanciful assumption" amounting to "rank speculation" (A-115).

The Court of Appeals' decision on these issues puts it in conflict with other Courts of Appeal, a dispute requiring resolution by this Court.

Joint and Several Liability

In order to overcome its failure to prove any causal connection, Chris-Craft lumps the Piper individuals with the other defendants in an attempt to maximize their involvement. Referring to "petitioners" throughout its brief, Chris-Craft transparently ignores the undisputed fact that the Piper individuals did not participate in or have knowledge of any later alleged violations.

The legal authority cited by Chris-Craft fully supports the Piper individuals' position. Joint and several liability, as the quotation by Dean Prosser reveals (Brief, p. 28),

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* The Piper individuals and their wives owned only about 150,000 of the 501,090 shares owned by all members of "the Piper family." The additional consideration, which Chris-Craft implies has been paid (Brief, p. 30 fn.), was not, and is still the subject of continuing litigation with Bangor Punta.

is only appropriate when "two or more causes combine to produce . . . a single result, incapable of any logical division." Chris-Craft attempts to obfuscate the real issue, which is that the Piper individuals' alleged violations in January did not combine with any later volations to produce a single result—Chris-Craft could have purchased more shares after January if it was willing to pay cash for them. Hence, if there were any harm at all, it was clearly divisible.

Chris-Craft implies that management's resistance to Chris-Craft's takeover attempt, and seeking assistance from First Boston, Grumman and then Bangor Punta, was illegal (Brief, pp. 5, 7, 29). But even the Court of Appeals found "no fault in the Piper family's effort to avert through a Grumman merger what they concluded was an unfavorable takeover by CCI. Such a maneuver is a common response to a takeover attempt" (A-39). Management owed a duty to the shareholders, even under Section 14(e), to take such action. Indeed, it is undisputed that as a result of management's resistance the Piper shareholders were later offered higher prices for their shares by both Chris-Craft and Bangor Punta. Nevertheless, the Court of Appeals has penalized management by its $36 million damage award.

Chris-Craft's claim that the Piper individuals never pressed the propriety of joint and several liability below (Brief, p. 31) is simply false. The Piper individuals' petition for rehearing of the Court of Appeals' liability decision emphasized that the issues of both their personal and joint and several liability were never litigated, briefed or even argued and requested a remand so that appropriate findings could be made.

Damages

Contrary to Chris-Craft (Brief, p. 35), the Piper individuals challenge the newly devised standard of damages used by the Court of Appeals. Its quantum leap

from an award of $2 million, representing the trial court's computation under the mandate of the decrease in the value of Chris-Craft's Piper Aircraft holdings, to some $36 million under a newly devised formula, while Chris-Craft keeps its shares of Piper Aircraft stock is grossly improper.*

The application of a standard which makes management of a target company into insurers of the raider's normal market risks also warrants review by this court, particularly when the "damages" are computed as of one year after the alleged violations which presumably caused the injury.

CONCLUSION

For the reasons stated in the Petition and herein, a writ of certiorari should issue.

Respectfully submitted,

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October 28, 1975

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* Chris-Craft avoids any acknowledgment that it still has its shares of Piper Aircraft stock, which clearly are worth more than the difference between its total purchase price, some $44 million, and the $36 million award. Its claim that it invested "$60 million in the contest, including carrying charges" (Brief, p. 4) is a gross distortion. The "carrying charges" include (a) interest paid on a $15 million loan arranged before the tender offer and drawn down in January in order to purchase the 300,000 shares, and (b) interest on subordinated debentures issued by Chris-Craft in 1968 before it began its purchases. Even the Court of Appeals refused to award these items as damages (B34-35).

Certificate of Service

I hereby certify that three copies of the foregoing Reply Brief for Petitioners were served by hand this 28th day of October on Arthur L. Liman, Esq., 345 Park Avenue, New York, New York 10022, counsel for Respondent. I further certify that all parties required to be served have been served.

Dated: October 28, 1975

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CONSOLIDATED WITH NOS. 75-354 AND 75-355

BRIEF FOR PETITIONERS

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IN THE

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BRIEF FOR PETITIONERS

Opinions Below

The opinion of the United States District Court for the Southern District of New York dismissing the complaint after trial is reported at 337 F. Supp. 1128 and is set forth in the separate appendix at A-125 through A-162. The opinions of a panel of the United States Court of Appeals for the Second Circuit reversing the District Court and finding liability is reported at 480 F.2d 341 and is set forth at A-1 through A-124. The decision of the District Court after the trial on remand and assessing damages is reported at 384 F. Supp. 507 and is set forth at B-43 through B-80. The opinion of the Court of Appeals reversing the District

Court and increasing the amount of damages is reported at 516 F.2d 172 and is set forth at B-1 through B-42.

Jurisdiction

On April 11, 1975 a panel of the Court of Appeals entered its decision reversing the District Court's assessment of damages. A timely petition for rehearing and rehearing en banc was denied on June 9, 1975 (E-5, E-7). A petition for a writ of certiorari was filed on September 5, 1975, granted on April 5, 1976 and consolidated with two other cases, *First Boston Corporation* v. *Chris-Craft Industries, Inc.*, No. 75-354 and *Bangor Punta Corporation, et al.* v. *Chris-Craft Industries, Inc.*, No. 75-355. The Jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Statutes Involved

Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e), provided at all relevant times:

> "(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request or invitation."*

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* By P.L. 91-567 adopted December 22, 1970, after the events complained of in this action, Congress added the following sentence:

> "The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative."

Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), provides in pertinent part as follows:

> "(a) The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of."

Questions Presented

1. Whether under Section 14(e) of the Securities Exchange Act of 1934 a tender offeror not seeking control on its tender offer is entitled to recover damages from three members of management of the target corporation for communications during the tender offer containing alleged misrepresentations in violation of Section 14(e), in the absence of proof that the alleged violations caused the tender offeror's subsequent injury—the loss of the opportunity to win a contest for control with another contestant which acquired control seven months later?

2. Whether three members of management of a target corporation may be held personally liable, jointly and severally, with other corporations when, seven months after the tender offer closed, another corporation, through transactions in which management of the target corporation did not participate and of which they had no knowledge, achieved control of the target corporation?

3. Whether under Section 28(a) of the Securities Exchange Act of 1934 an offeror is entitled to recover $36 million in damages on a $44 million investment without proof of the actual damages suffered on account of the acts

of management complained of calculated upon a hypothetical sale one year after management's alleged violations and four months after another corporation acquired control of the target corporation?

Statement of the Case

Petitioners are Howard Piper, Thomas F. Piper and William T. Piper, Jr. ("the Piper individuals") who were shareholders, officers and three of the eight members of the Board of Directors of Piper Aircraft Corporation in January 1969. Respondent is Chris-Craft Industries, Inc. ("Chris-Craft"), which in January 1969 made a cash tender offer for up to 300,000 shares of Piper Aircraft common stock. Despite the opposition of the Board of Directors of Piper Aircraft, Chris-Craft acquired more than 300,000 shares on its tender offer. In May 1969, three months later, Bangor Punta Corporation ("Bangor Punta") began purchasing Piper Aircraft shares for cash and through an exchange offer. By September 1969 it had acquired over 800,000 shares, enough to give it slightly more than 50% of the outstanding shares. Chris-Craft, by September 1969, had acquired just under 700,000 shares, or about 42% of the outstanding shares.

The decisions under review are two decisions of the United States Court of Appeals for the Second Circuit. In the first decision in March 1973 the panel reversed the judgment of the United States District Court for the Southern District of New York, which in December 1971 had dismissed Chris-Craft's complaint after trial, and remanded the case to the District Court with express directions to award damages and injunctive relief to Chris-Craft. On remand the District Court entered judgment against all defendants for $1,673,988 plus $599,010.89 prejudgment interest and an injunction against Bangor Punta. On appeal the Court of Appeals affirmed the injunction,

but reversed the District Court's damage determination and directed entry of judgment of $25,793,365 against all defendants plus more than $10 million in prejudgment interest.*

a. Factual Background

Beginning in late December 1968 Chris-Craft's President and Chief Executive Officer began purchasing shares of Piper Aircraft common stock on the New York Stock Exchange through a confidential numbered account with a broker (A-9, n. 2). By January 22, 1969 Chris-Craft had purchased about 100,000 shares at a total cost of over $5 million. On January 22 when Piper Aircraft stock was selling on the New York Stock Exchange at $52.50 per share, Chris-Craft purchased an additional 101,100 shares from a mutual fund, paying $65 per share (A-10). The next day Chris-Craft announced a cash tender offer for up to 300,000 additional shares of Piper Aircraft stock at $65 a share beginning immediately and ending 11 days later on February 3 (*ibid.*). Piper Aircraft's annual meeting was set for February 4 (R.1525A).**

Since Piper Aircraft had 1,644,790 shares outstanding, Chris-Craft would have required an additional 620,000 shares in order to acquire majority control. It limited its tender offer, however, to only 300,000 shares but reserved the right to take some or all of any additional shares ten-

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* After the Court of Appeals' first reversal of the District Court on liability issues in 1973, petitioners sought a writ of certiorari from this Court, which was denied in October 1973 (414 U.S. 910). The denial of such a writ does not foreclose this Court from considering those issues of liability on the present writ. See, *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 365-6, n. 1, rehearing denied, 410 U.S. 975 (1973).

** References to the record, consisting of the appendix on appeal in the Court of Appeals, are prefaced by the designation "R." References to the volumes containing the exhibits on appeal are prefaced by the designation "R.Ev."

dered. The tender offer required shareholders to tender an irrevocable proxy with their shares (Def. Ex. E; R.Ev. 708; R.1328A). This was necessary since Piper Aircraft's annual meeting to elect directors was set for February 4 with the record date one month earlier, and Chris-Craft was unwilling to wait an additional year before getting representation on Piper Aircraft's Board (R.1525A). Chris-Craft, therefore, sought to obtain proxies not only from the shareholders who tendered on its offer but also from the shareholders whose shares Chris-Craft had purchased during the month of January (R.248A).

Upon hearing of Chris-Craft's tender offer, management of Piper Aircraft immediately sought outside professional assistance in order to learn more about Chris-Craft. Accordingly, they contacted Piper Aircraft's investment bankers, The First Boston Corporation ("First Boston"), Piper Aircraft's counsel, Chadbourne, Parke, Whiteside & Wolff, and its auditors, Arthur Young and Company. Piper Aircraft's counsel in turn contacted D. F. King and Co., a proxy solicitation firm (R.228A; R.2049A). In addition, a meeting was arranged between members of Piper Aircraft management and Chris-Craft's management which proved completely unsatisfactory (R.2050A).

Information concerning Chris-Craft was rapidly accumulated. Piper Aircraft's management, after studying the material, decided that Chris-Craft's investment in Piper Aircraft would not be in the interests of Piper Aircraft shareholders. One factor in that decision was Chris-Craft management's "track record" (R.2051A-2052A). The prior corporate history of the Chris-Craft management did not inspire confidence in its ability to operate a manufacturing enterprise (R.1544A-1548A). Indeed, in a period of more than 10 years, the only company in whose securities Chris-Craft's management had invested and remained were those of Chris-Craft itself (R.1591A). Moreover, since the offer was limited to only 300,000 shares, the other shareholders would be left "hanging in limbo" (R.2053A).

On January 25 Piper Aircraft's eight-man Board of Directors met, unanimously decided to oppose Chris-Craft's tender offer and authorized management to communicate their opposition to Piper Aircraft shareholders. By letters dated January 27 and 28, over the signature of William T. Piper, Jr., President of Piper Aircraft at the time and one of the petitioners herein, shareholders were advised not to accept Chris-Craft's tender offer, with the reasons for that recommendation set forth (R.242A; R.246A).

Piper Aircraft management believed that affiliation with Grumman Aircraft Engineering Corporation ("Grumman"), with which it was familiar, would be a better alternative for Piper Aircraft shareholders than Chris-Craft (R.2056A-2058A). They, therefore, entered into negotiations, participated in by investment bankers for Grumman, Dillon Reed, and First Boston for Piper Aircraft (R.258A), and agreed to sell Grumman 300,000 authorized but unissued shares of stock at $65 per share (R.260A). Since the agreement constituted a material event, immediately after the agreement was signed, Piper Aircraft on January 29 issued a press release announcing it (R.266A-267A). On the same day the text of the press release was mailed to shareholders with the admonition: "Since the February 4th annual meeting is only a few days away, we urge you to sign, date and mail the enclosed proxy now" (R.268A).

After the announcement of the Grumman transaction the market price of Piper Aircraft shares declined from $64¼ on January 28 to $59⅝ on February 3, the date Chris-Craft's tender offer closed (A-114, n. 3). This made Chris-Craft's tender offer more attractive. As a consequence, Chris-Craft became concerned since it did not have sufficient cash to purchase substantially more than 300,000 shares. Chris-Craft, therefore, hastily began searching for funds to purchase excess shares tendered and learned that the cost of borrowing such funds would have been 43.11%

(A-114). It never borrowed those funds and instead closed its tender offer on February 3, as it had planned.

Chris-Craft received 304,606 shares of Piper Aircraft stock on its tender offer. It purchased them all, giving it a total of 547,106 shares, or about 33% of the shares outstanding. It publicly announced that the tender offer was concluded successfully (R.282A), and proceeded to vote the proxies it had obtained at Piper Aircraft's annual meeting the next day. Since Piper Aircraft has cumulative voting, Chris-Craft elected two representatives to Piper Aircraft's eight-man Board of Directors. Chris-Craft also began preparation of a registration statement for an exchange offer to Piper Aircraft's shareholders (R.290A; R.291A; R.292A).

The events just described constituted the sole actions by Piper Aircraft for which the Piper individuals were ultimately held liable to Chris-Craft for over $36 million in damages. Although Chris-Craft vehemently criticizes Piper Aircraft's management for subsequent events, the simple fact is that none of them caused Chris-Craft harm and no court has ever held otherwise.

b. The Subsequent Events

In March 1969 the agreement with Grumman was terminated and Piper Aircraft resumed its search for a better alternative than Chris-Craft.* Bangor Punta, which was among the companies contacted earlier, was unwilling to enter into an agreement with Piper Aircraft unless it was assured it could purchase the 501,090 shares of Piper Aircraft common stock owned by the Piper family, defined

* Piper Aircraft's agreements to purchase SouthPly, Inc. and United States Concrete Pipe Company of Florida were made on March 22 after First Boston had given Piper Aircraft written opinions that the terms of the proposed purchases were fair and equitable to the Piper Aircraft shareholders (R.295A). The purchases were rescinded on April 14 (R.307A). Chris-Craft did not claim that they had any effect on its efforts to acquire Piper Aircraft shares.

by the parties to mean William T. Piper, Sr., the founder of Piper Aircraft, and the 43 trusts, corporations and individuals related to him (R.212A; Pl. Ex. 52; R.Ev. 146, 172, Trial Tr. 884).

On May 8, 1969 Bangor Punta and the Piper family agreed that Bangor Punta would acquire the 501,090 shares and make an exchange offer to all other Piper Aircraft shareholders. On May 8, 1969 Piper Aircraft and Bangor Punta issued a press release announcing that agreement (R.329A-330A).

Thereafter, between May 14 and 23 Bangor Punta purchased 120,200 shares of Piper Aircraft common stock in privately negotiated transactions. The purchases were publicly announced when made (R.374A). Neither Piper Aircraft nor the Piper individuals participated in or had any prior knowledge of them.

On May 29 Bangor Punta filed its registration statement for the exchange offer, which became effective on July 18. Bangor Punta acquired an additional 110,802 Piper Aircraft shares on the offer and owned 732,092 shares, amounting to 44.5% of the outstanding shares.

As indicated above, after its tender offer closed, Chris-Craft filed a registration statement with the SEC for an exchange offer for Piper Aircraft shares. The exchange offer, which became effective on May 19, was for a minimum of 80,000 shares (R.456A). The minimum number of shares was not tendered and on July 24, while Bangor Punta's exchange offer was effective, Chris-Craft made a second exchange offer for up to 300,000 shares, with no minimum (*ibid.*). That exchange offer expired on August 4 with 112,089 Piper Aircraft shares tendered (R.476A). As a result, Chris-Craft owned 668,295 shares, or 40.6% of the outstanding shares.

At the conclusion of the Chris-Craft and Bangor Punta exchange offers neither company had a majority of the

shares. Between August 12 and August 18 Chris-Craft purchased an additional 29,200 shares for cash and then ceased all purchases (R.481A). It thus owned 697,495 shares, amounting to 42.4% of the outstanding shares.

Beginning on August 8 Bangor Punta made open market purchases of Piper Aircraft shares. By September 5, Bangor Punta had purchased an additional 100,614 shares, giving it 832,706 shares, or 50.6% of the outstanding shares.*

As the District Court observed, the "contest for control was over except for the litigations questioning the actions of the parties along the way which has embroiled them in claims and counter-claims" (A-131).

c. The Proceedings Below

On May 22, after public announcement of Bangor Punta's acquisition of the Piper family's shares and the 120,200 privately purchased shares, Chris-Craft commenced this action. Named as defendants were Piper Aircraft and the five members of its Board of Directors who were not Chris-Craft's representatives (although only Piper Aircraft and the Piper individuals were served), Bangor Punta and its Board of Directors (with only two members served), and First Boston and two of its officers, both of whom were served. After the Court of Appeals decision on liability Chris-Craft stipulated to dismiss the action as to them (B-44, n. 1).

The complaint, which sought equitable relief and damages, alleged violations of § 5(c) of the Securities Act of 1933, 15 U.S.C. § 77e(c) and Rule 135 promulgated thereunder, 17 C.F.R. § 230.135, and of §§ 9, 10(b), and 14(e)

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* For the convenience of the Court, Addendum I to this brief contains a chronological listing of all purchases of Piper Aircraft shares made by both Bangor Punta and Chris-Craft.

of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i, 78j(b) and 78n(e), and Rules 10b-5 and 10b-6 promulgated thereunder, 17 C.F.R. §§ 240.10b-5 and 240.10b-6.

1. Chris-Craft's Motion for a Preliminary Injunction in July 1969

On July 23, while Bangor Punta's exchange offer was open, Chris-Craft moved for a preliminary injunction to prevent Bangor Punta from gaining or exercising control of Piper Aircraft. The motion charged that Piper Aircraft's support of Bangor Punta's exchange offer was unlawful under Section 14(e); that Bangor Punta's May 8 press release was an offer to sell securities in violation of § 5(c) of the 1933 Act and Rule 135 thereunder; and that Bangor Punta's negotiated purchases of the 120,200 shares constituted a violation of Rule 10b-6.

Judge Tenney of the United States District Court for the Southern District of New York held there were no violations and denied the preliminary injunction on August 19 (303 F. Supp. 191; C-32). Chris-Craft appealed only with respect to Bangor Punta. The Court of Appeals, en banc, affirmed the denial of the injunction (426 F.2d 569; C-1) since:

> "Chris-Craft was free to compete equally with Bangor Punta for the remaining Piper shares, and it did so. We do not understand Chris-Craft to allege that prior misdeeds of Bangor Punta so determined the course of the competition for shares after the date of the decision below that Chris-Craft was placed at any real disadvantage" (C-9).

However, it disagreed with the rationale of the District Court with respect to § 5(c) and Rule 10b-6 and remanded the case for further proceedings (C-18).

2. The First Trial of the Action in March 1971

The action was tried before Judge Milton Pollack of the United States District Court for the Southern District

of New York sitting without a jury. It began on February 6, 1971, was adjourned to March 9, 1971 and continued until concluded on March 19, 1971.* In December, 1971 the District Court dismissed Chris-Craft's complaint against all defendants (A-161).

At trial, Chris-Craft claimed that the two letters sent by Piper Aircraft on January 27 and 28, recommending that shareholders not accept Chris-Craft's tender offer, were materially misleading in violation of Rule 10b-5 and Section 14(e). Those letters conveyed the reasons why Piper Aircraft's Board of Directors believed the shareholders should reject Chris-Craft's tender offer. Among the reasons stated was the belief of the Board that the offer was "inadequate and not in the best interests" of the Piper Aircraft shareholders (R.242A; R.246A).

Chris-Craft claimed that the letters "could not be read to refer to any inadequacy of the Chris-Craft offer other than in respect to price and—to establish Piper's bad faith and intention to mislead" it pointed out that First Boston "had advised Piper [Aircraft] that $65 per share was a fair price" and the agreement with Grumman "contemplated a sale of Piper [Aircraft] stock at $65 per share" (A-135).**

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* The trial was held concurrently with two related cases brought by Bangor Punta against Chris-Craft and by the SEC against Bangor Punta. Neither Piper Aircraft nor the Piper individuals were parties to either of the other two actions. Piper Aircraft's counterclaim against Chris-Craft was tried at the same time. Judge Pollack dismissed the counterclaim (A-162) and Piper Aircraft did not appeal the dismissal (A-21, n. 7).

** The "advice" was the view of Paul Miller, President of First Boston, that the $65 price was a "fair price", but because the tender offer was limited to 300,000 shares, the offer as a whole was inadequate (Pl. Ex. 78F; R.Ev. 460, 465; Trial Tr. 1271). The contemplated sale to Grumman at $65 per share, of course, was announced as soon as agreement was reached the very next day (R.266A).

The District Court rejected Chris-Craft's claim. It found that the word "inadequate" could not be construed as referring solely to the price, and if it were, the statement "would be more fatuous than misleading" because any "shareholder with a telephone or a newspaper at hand could compare the current market for Piper [Aircraft] shares with Chris-Craft's offer" (A-135). That comparison would have shown that the $65 price was about $12.50 more than the market price for Piper Aircraft shares on the New York Stock Exchange the day before the tender offer was made. It found further that the word "inadequate" referred to the entire limited tender offer not just to the $65 price and reflected Piper Aircraft management's views on the prospects of Piper Aircraft and its unflattering views of Chris-Craft's management (A-135 to A-136).

Chris-Craft also challenged the Grumman transaction as a sham, entered into solely to interfere with its tender offer. The agreement contemplated that if merger negotiations between Piper Aircraft and Grumman proved fruitless, Grumman had the right after six months to require Piper Aircraft either to repurchase the 300,000 shares or find another buyer at Grumman's cost plus nominal interest (R.261A). The District Court found that the transaction was not a sham and that the repurchase provisions were rational steps for Piper Aircraft and Grumman to take (A-136). Accordingly, it rejected Chris-Craft's claims as "unfounded" (A-138).

Although Chris-Craft challenged other matters in which Piper Aircraft participated after January 29, none of them were found unlawful (A-138; A-147).* The District Court, therefore, dismissed the complaint against Piper Aircraft and *"a fortiori"* against the Piper individuals (A-161).

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* At the trial Chris-Craft also raised claims under Rule 10b-5 against Piper Aircraft asserting it was defrauded in connection with the purchases it made. The District Court rejected Chris-Craft's claims (A-136 to A-137; A-153 to A-157) and Chris-Craft's appeal did not raise those issues (A-21, n. 7).

The other events challenged by Chris-Craft, viz. Bangor Punta's purchase of 120,000 shares allegedly in violation of Rule 10b-6 and the nondisclosure of Bangor Punta's consideration of disposing of the Bangor and Aroostook Railroad, did not involve, and were not in any way attributable to, Piper Aircraft or the Piper individuals. They were unaware of the transactions and did not participate in them. Those issues, therefore, will not be discussed in this brief.*

3. The Court of Appeals Reversal of the District Court in March 1973

On Chris-Craft's appeal the Court of Appeals reversed the District Court. It found the Piper individuals, but not Piper Aircraft, liable to Chris-Craft for violation of Section 14(e) solely in connection with the January communications.

The Court of Appeals began its decision with a discussion of what it perceived as "the proper function of the private action for damages in the overall pattern of enforcement of the federal securities laws" (A-21). It declared that "vigorous enforcement of the federal securities laws, particularly the antifraud provisions, can be accomplished effectively only when implemented by private damage actions" (A-22). "This policy of vigorous enforcement through private litigation" it said, has resulted in "a broadening of standing to sue and a relaxation of the elements of proof in a private action" (*ibid.*). It asserted that the "scienter requirement in a Rule 10b-5 private damage action appears to have been reduced to a knowledge of falsity or reckless disregard for the truth standard" (*ibid.*). Later in the opinion Judge Timbers declared that "intent to defraud is not an indispensable element in a

* The questions concerning standing, scienter and damages raised by those issues are applicable, however, to the Piper individuals as well. To the extent they are not covered in this brief we respectfully refer to the positions taken by First Boston and Bangor Punta in their respective briefs.

private action under Rule 10b-5" (A-35). With respect to the reliance requirement, the court observed that the standard "has been relaxed under certain circumstances; for example, if a material omission or misstatement is proven, a presumption may be raised that the plaintiff relied on the deception to his detriment" (A-22 to A-23).*

Applying these principles, the Court of Appeals held that Chris-Craft had standing to sue for damages under Section 14(e). Analogizing Chris-Craft's claim to the common law tort of interference with a "prospective advantage," the court would "not infer from the silence of the statute that Congress intended to deny a federal remedy and to extinguish a liability which, under established principles of tort law, normally attends the doing of a proscribed act" (A-30). With respect to whether Section 14(e) was violated, the court followed "the principles developed under Rule 10b-5 regarding the elements of such violations" (A-34). It held that "a violation of § 14(e) is shown when there has been a material misstatement or omission concerned with a tender offer and when such misstatement or omission was sufficiently culpable to justify granting relief to the injured party" (*ibid.*). Liability under Section 14(e) is determined, said the court, when "plaintiff has established that defendant either (1) knew the material facts that were misstated or omitted, or (2) failed or refused to ascertain such facts when they were available to him or could have been discovered by him with reasonable effort" (A-37).

Judge Timbers, writing for the panel, disagreed with the District Court with respect to the January 27 and 28 letters to shareholders, which recommended that share-

* "Discernment must be exercised in determining whether a particular violation of an antifraud provision brings into play the policy of vigorous enforcement with all its effects" stated the court in a footnote, since "the harm caused by the violation may not be regarded as sufficiently momentous to justify a dilution of the standards of proof normally required in an action for fraud" (A-24, n. 8).

holders reject Chris-Craft's tender offer because in management's opinion, among other faults, it was inadequate. He declared that a "reasonable shareholder reading the letter most likely would assume that the reference was to price" and that since "price usually is what a person contemplating a sale of shares is most concerned with, a prudent shareholder naturally would assume that the Piper family was addressing itself to that consideration in opposing the offer. If the Piper family intended to refer to other factors, it surely would have been more specific" (A-38).* The Piper individuals were therefore held to have violated Section 14(e) "when they sent out these shareholder letters knowing that they were materially misleading" (*ibid.*).

The Court of Appeals also reversed the District Court with respect to the Grumman transaction. It agreed with the District Court that the transaction was not a sham, but held that the announcement and letter of January 29 were misleading because they failed to mention the repurchase provisions of the agreement (A-39). The Piper individuals were held to have violated Section 14(e) because they "recklessly disregarded" what the Court of Appeals defined as their "obligation to shareholders in failing to disclose with substantial accuracy a transaction which was likely to affect the attitude of Piper [Aircraft] shareholders toward the [Chris-Craft] tender offer" (A-40).

Having found the January communications misleading, the Court of Appeals assumed that the communications "misled the Piper [Aircraft] shareholders into believing that [Chris-Craft's] tender offer was undesirable" (A-62). Chris-Craft's tender offer, it declared,

> "could be fruitful only if Piper [Aircraft] shareholders believed that the price was currently a fair one

* Although the parties had stipulated in the trial court that the "Piper family" referred to 43 individuals, trusts and corporations, throughout its opinion the Court of Appeals referred to the Piper individuals as the "Piper family."

> and would remain so for at least a reasonable period in the future. The fairness of the offer is demonstrated by the fact that, despite the misrepresentations of the Piper family, over 300,000 shares were tendered. Considering the soundness of the offer and the materiality of the Piper family's deceptions, it is a reasonable presumption that [Chris-Craft] was unlawfully denied the opportunity to purchase additional shares" (*ibid.*).

The Court of Appeals majority, continuing with what Judge Mansfield in dissent called a "fanciful assumption" amounting to "rank speculation," (A-115), surmised that

> "these misleading statements most likely had a continuing adverse effect on [Chris-Craft's] attempts to acquire Piper [Aircraft] shares. When Piper [Aircraft] shareholders were deciding whether or not to accept [Chris-Craft's later] exchange offer, many undoubtedly remembered and were influenced by the Piper family's misleading January statements portraying [Chris-Craft] as a company that made inadequate and unfair offers" (A-62 to A-63).

Having found material misrepresentations, and presuming reliance by shareholders upon them, the Court of Appeals majority concluded that

> "considering the narrow margin of victory here, the Piper family's misstatements and omissions in the January shareholder letters and the Grumman press release denied to [Chris-Craft] a fair opportunity to win the contest for control" (A-63).*

* Although the Court of Appeals also reversed the District Court and found that letters written to shareholders in June and July recommending against accepting Chris-Craft's exchange offers and in favor of Bangor Punta's exchange offer were misleading (A-40 to A-41), the court held they did not harm Chris-Craft (A-63). Judge Tenney, in denying Chris-Craft's motion for a preliminary injunction in August 1969, had similarly rejected Chris-Craft's contentions concerning those letters as "unsound" (C-43 to C-44).

The court held that Piper Aircraft was not liable to Chris-Craft, although the Piper individuals were. In a passing reference in a footnote, the Court of Appeals majority stated that the "evidence shows that members of the Piper family acted not on behalf of the corporation in committing their illegal acts, but in their own individual interests" (A-68, n.31).

Finally, the Court of Appeals agreed with the District Court that Chris-Craft failed to prove it would have obtained control but held that since Bangor Punta's violations gave it control of Piper Aircraft (A-56; A-66), Chris-Craft was denied "a fair opportunity to compete for control" (A-60; A-66). It concluded that "the conduct of each of the defendants, through their violations of the securities laws, contributed to the success" of Bangor Punta's takeover and directed that all defendants be held jointly and severally liable (A-69).

Judge Mansfield dissented with respect to the Piper individuals since Chris-Craft had failed to prove that it suffered any loss as a result of the January communications (A-113). He pointed out that the District Court found that Chris-Craft was not seeking more than 300,000 shares on its tender offer and that Chris-Craft did not have sufficient funds to purchase any significant amount of shares in excess of 300,000 (*ibid.*). He further demonstrated that in the final analysis Chris-Craft's failure to purchase control of Piper Aircraft was the result of its having run out of cash in August and September when Bangor Punta was able to purchase over 100,000 additional shares for cash (A-114 to A-116). Judge Mansfield concluded:

> "Thus there has been a complete failure to show that the Piper family's January letters and press release, which form the sole basis for the majority's decision

> holding liable the Piper family defendants, caused any damage to [Chris-Craft]" (A-116).*

4. The Trial on Remand in April 1974

In April 1974 Judge Pollack conducted the trial on remand to assess damages. The Court of Appeals had held that what the violations found had "caused was a denial to [Chris-Craft] of a fair opportunity to compete for control of Piper [Aircraft]. The specific injury sustained was a reduction in the value of [Chris-Craft's] Piper [Aircraft] holdings upon [Bangor Punta's] unfairly obtaining control" (A-60). Evidence was presented to Judge Pollack on the reduction in value of Chris-Craft's Piper Aircraft shares attributable to Bangor Punta's acquiring a majority of the shares. Since the District Court had found, and the Court of Appeals agreed, that Chris-Craft failed to prove it would have acquired control but for the alleged violations, what Chris-Craft lost was the opportunity to get control. Based upon the evidence the District Court found that

> "actual majority control was worth between 5% and 10% above fair market value of Piper [Aircraft] stock in the circumstances of this case with a bloc of 37% or 42% of the total capital opposing the majority. Certainly then, the *opportunity* (speculative at best) of gaining a majority from a 42% plurality is generously valued at 5% above fair value of the stock, in such circumstances" (B-70; emphasis the court's).

The District Court, therefore, granted Chris-Craft damages equal to five percent of the fair market value of the stock ($2.40 per share) times the total number of shares owned by Chris-Craft on September 5, when Bangor Punta ac-

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* In view of the brevity of the discussion in the opinions below of the liability of the Piper individuals, those portions of the opinions are reprinted in Addendum II to this brief.

quired majority control (697,495), for total damages of $1,673,988. In the exercise of his discretion, Judge Pollack also awarded Chris-Craft prejudgment interest which amounted to $599,010.89.*

5. The Court of Appeals Reversal of the Damage Formulation in April 1975

The Court of Appeals reversed the District Court's award of damages in April 1975. It held that its mandate that the "measure of damages should be the reduction in the appraisal value of [Chris-Craft's] Piper [Aircraft] holdings attributable to [Bangor Punta's] taking a majority position and reducing [Chris-Craft] to a minority position" (A-69) required the District Court to measure damages based upon the difference between Chris-Craft's costs (B-22) and the amount Chris-Craft could have received had it sold its shares after Bangor Punta acquired control (B-23). The Court hypothesized that a sale could not have occurred until January 1970. By that time the stock market had substantially declined, but the Court of Appeals held that "there is no inequity under these circumstances in shifting the entire burden of [Chris-Craft's] loss to defendants" (B-27).

Chris-Craft's damages were calculated to be the difference between the average price it paid for each share of stock it purchased ($63.98) and the price per share it could have obtained in January 1970 ($27.00), $36.98 per share, amounting to $25,793,365 for Chris-Craft's bloc of 697,495 shares (B-31). Finally, the Court "affirmed" the award of prejudgment interest (B-32), thus adding more than $10 million to Chris-Craft's judgment.

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* The Court of Appeals also directed that the District Court on remand enter an injunction against Bangor Punta with respect to the 120,200 shares purchased for cash in May and the 110,802 shares obtained on its July exchange offer.

Summary of Argument

The Court of Appeals twice reversed the District Court by purporting to apply legal standards allowing vigorous enforcement of the securities laws through private actions. Its perception of those standards has been repudiated by this Court. For example, the perceived "broadening of standing to sue" (A-22) was rejected in *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723 (1975). The "relaxation of the elements of proof in a private action" (A-22) was disallowed by this Court in *Rondeau* v. *Mosinee Paper Corp.,* 422 U.S. 49 (1975). There the Court declared that a plaintiff still has the burden of establishing the traditional prerequisites of relief and reaffirmed the principle of *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375, 389 (1970) that "damages should be recoverable only to the extent that they can be shown."

The standard of scienter, said the Court of Appeals, "appears to have been reduced to a knowledge of falsity or reckless disregard for the truth" (A-22) and specifically held that "intent to defraud is not an indispensable element" (A-35). This Court, however, has since held that scienter requires an intent to deceive, manipulate or defraud. *Ernst & Ernst* v. *Hochfelder,* —— U.S. ——, 96 S.Ct. 1375 (1976).

In determining whether Section 14(e) has been violated, the Court of Appeals declared that it would "follow the principles developed under Rule 10b-5" (A-34). If a "misstatement or omission was sufficiently culpable to justify granting relief to the injured party", it said (A-34), a violation would be found. The court even noted that to bring into play the policy of vigorous enforcement of the securities laws depends on whether the court regards the harm "as sufficiently momentous to justify a dilution of the standards of proof normally required in an action for fraud" (A-24, n. 8). In *Blue Chip Stamps, supra,* this

Court directly rejected such a "shifting and highly fact-oriented disposition" as an unsatisfactory basis for a "rule of liability imposed on the conduct of business transactions" (421 U.S., at 755).

By permitting Chris-Craft's recovery, the Court of Appeals eliminated a basic element of tort law, causation in fact. Based upon its view of what shareholders "would assume" or what would be "likely to affect" them, the Court of Appeals determined that shareholders interpreted the January communications as it did; assumed that in reliance on that interpretation shareholders did not tender to Chris-Craft and presumed that Chris-Craft was denied the opportunity to purchase additional shares (A-62).

The Court of Appeals excused Chris-Craft from not purchasing shares subsequent to its tender offer although some were available at less than $65 (A-114). It accepted testimony of a Chris-Craft witness who was disbelieved by the District Court, announced that "it appears" financing was available and was "satisfied" that Chris-Craft could and would have purchased more shares on its tender offer (A-62). Having completely satisfied Chris-Craft's burden of proof, the Court of Appeals determined that "considering the narrow margin of victory here", the January events contributed to Chris-Craft's loss by denying it "a fair opportunity to win the contest for control" (A-63).

The Court of Appeals thus diluted the appropriate standards of proof in order to implement a policy, created by the court itself, of "vigorous enforcement" of Section 14 (e) of the Williams Act on behalf of an offeror.

The legislative history of the Williams Act, of which Section 14(e) is a part, makes it clear that its purpose is to protect shareholders not offerors and not management. Congress was concerned that shareholders, when confronted with a tender offer, be given sufficient information to enable them to make an informed judgment as to

whether or not to accept that offer. The Court of Appeals decision grossly misapplied Section 14(e) and permitted the tender offeror to obtain greater advantages than would the shareholders themselves. The result gives the loser in a contested tender offer advantages which far outweigh the evil which Congress sought to prevent, and tips the balance of regulation in favor of the person making the takeover bid.

In addition to dispensing with proof of the traditional prerequisites for relief, the Court of Appeals created a new form of relief by holding the Piper individuals jointly and severally liable even though they did not participate in the events which were presumed to have caused Chris-Craft's alleged damages. If their alleged violations in January caused any injury (something Chris-Craft never proved), it was separate from and independent of Bangor Punta's later conduct. The Piper individuals had nothing to do with Bangor Punta's alleged violations.

Apart from improperly imposing personal joint and several liability, the Court of Appeals damage formulation compensates Chris-Craft for a market decline between the time of the alleged violations in January 1969 and the hypothetical sale date in January 1970. Under Section 28(a) of the 1934 Act, however, liability may only be imposed for the "actual damages on account of the act complained of" not for damages caused by independent market forces.

In effect, the decision gives a tender offeror a complete insurance policy against risks of loss should its tender offer fail. If Section 14(e) is construed to give the loser standing to sue merely because he lost and the benefit of assumptions, presumptions and market declines, the purpose of Section 14(e) to keep shareholders informed will be stretched well beyond the limits intended by Congress.

ARGUMENT

The Williams Act was enacted to provide disclosure of material information to shareholders by a person making a tender offer; its enforcement does not require judicial elimination of the traditional prerequisites of relief

The Williams Act of which Section 14(e) is a part was enacted in 1968, as an amendment to the Securities Exchange Act of 1934. Its purpose was to require disclosure to shareholders of the identity, financial arrangements and plans of the person making a takeover bid. Most of the provisions of the Act specify the information which the bidder must furnish when he accumulates the requisite percentage of stock [Section 13(d)] or when he makes a tender offer to acquire that percentage [Section 14(d)].*

The Act does not expressly create a private right of action for violation of its provisions. While this Court has "not hesitated to recognize the power of federal courts to fashion private remedies for securities laws violations when to do so is consistent with the legislative scheme and necessary for the protection of investors as a supplement to enforcement by the Securities and Exchange Commission," *Rondeau* v. *Mosinee Paper Corp., supra,* 422 U.S., at 62, nevertheless "it by no means follows that the plaintiff in such an action is relieved of the burden of establishing the traditional prerequisites of relief" (*id.,* at 63).

We shall demonstrate in part a (pp. 26-35) that the Court of Appeals, in order to enforce its perception of the

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* As originally enacted in 1968 the percentage was 10%. By P.L. 91-567, adopted December 22, 1970, the percentage was reduced to 5%. See, *Rondeau* v. *Mosinee Paper Corp.,* 422 U.S. 49, 55, n. 4 (1975).

legislative purpose of Section 14(e), relieved Chris-Craft of the burden of establishing the elements necessary to obtain relief against the Piper individuals.

The Senate Report accompanying the Williams Act described the alternatives available to a shareholder when suddenly confronted with a tender offer [S. Rep. No. 550, 90th Cong., 1st Sess., p. 2 (1967)]:

> "He can tender all of his shares immediately and hope they are all purchased. However, if the offer is for less than all the outstanding shares, perhaps only a part of them will be taken. In these instances he will remain a shareholder in the company, under a new management which he has helped to install without knowing whether it will be good or bad for the company.
>
> "The shareholder, as another alternative, may wait to see if a better offer develops, but if he tenders late, he runs the risk that none of his shares will be taken. He may also sell his shares in the market or hold them and hope for the best. Without knowledge of who the bidder is and what he plans to do, the shareholder cannot reach an informed decision."

In *Rondeau, supra,* 422 U.S., at 58-59 this Court observed:

> "By requiring disclosure of information to the target corporation as well as the Securities and Exchange Commission, Congress intended to do no more than give incumbent management an opportunity to express and explain its position. The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts. Indeed, the Act's draftsmen commented upon the 'extreme care' which was taken 'to

avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid' ".

We shall demonstrate in parts b and c (pp. 35-46) that the Court of Appeals' decisions not only tip the balance of regulation against management, but give the offeror greater protection than the shareholders are afforded, yet the shareholders are the class Congress intended to protect.

In part d (pp. 46-50) we shall demonstrate that the damages awarded against the Piper individuals are far in excess of the actual damages on account of the acts complained of in contravention of Section 28(a) of the 1934 Act.

a. By Presuming Both Causation and Injury the Court of Appeals Extended Section 14(e) Beyond Its Intended Limits.

Chris-Craft's tender offer on January 23, 1969 was for up to 300,000 shares. At the time, there were over 1,400,000 shares outstanding in the hands of other shareholders.* The price on the tender offer was $65 per share, $12.50 more than the market price. Piper Aircraft shareholders holding 304,606 shares accepted the offer. Since the offer was limited to 300,000 shares, other shareholders did not tender, but sold their shares on the New York Stock Exchange instead for less than $65 per share. Indeed, Chris-Craft stipulated in the trial court that while its tender offer was open it purchased 38,800 of the 97,500

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* Piper Aircraft had 1,644,790 shares outstanding in 1969 (B-5, n. 3; Addendum I, *infra*). By January 23, Chris-Craft had purchased over 200,000 shares for cash (B-4 to B-5; Addendum I, *infra*).

shares traded during the period on the New York Stock Exchange (R.272A).

The remaining shareholders did not tender their shares to Chris-Craft during the tender offer. Some subsequently sold their shares on the New York Stock Exchange for prices higher than $65 (R.651A); others sold to Bangor Punta for cash in May, again at prices higher than $65 per share (R.389A; R.395A; R.397A; A-16); some tendered their shares to Chris-Craft on its exchange offer in July, receiving a package of securities valued higher than $65 per share (A-140, n. 10); some tendered their shares to Bangor Punta on its exchange offer in July, also receiving a package of securities valued higher than $65 per share (*ibid.*); still others did not tender to either Bangor Punta or Chris-Craft but sold them in August and received more than $65 per share (R.654A); finally, some shareholders retained their shares and either sold them much later or hold them to this day.

The Piper Aircraft shareholders thus took advantage of all the various alternatives available to them.

The Court of Appeals, however, conclusively presumed that the shareholders who received Piper Aircraft's January 27 and 28 letters were misled. Those letters gave management's reasons why shareholders should reject Chris-Craft's tender offer. Those reasons included management's views on the prospects of Piper Aircraft in the general aviation industry as well as the probability—which later became a reality—that more would be offered for the shares, and their opinion that since the offer was a limited one not all shares would be accepted and, therefore, the offer as a whole was inadequate. The District Court found that this was the proper interpretation of the letters. The Court of Appeals disagreed. It ignored the many other paragraphs of the letters and focused solely on management's opinion that the offer was inadequate;

it then decided that a shareholder "most likely would assume" that the reference was to price and conclusively presumed that this was a material misrepresentation upon which an unspecified number of unidentified shareholders relied in not tendering to Chris-Craft.

The Court of Appeals approach ignores the circumstances and other portions of the letters, adopts the least appropriate interpretation of them and converts an honestly held opinion into a misrepresentation of fact. The standard of materiality thus applied amounts to an assumption that shareholders would interpret the letters only one way and that some unspecified number of them would be influenced by that interpretation and not tender.

In *Smallwood* v. *Pearl Brewing Company,* 489 F.2d 579, 604 (5 Cir.), cert. denied, 419 U.S. 873 (1974), the Fifth Circuit pointed out that this Court did not intend "to replace the traditional standard with a more relaxed one. There is no evidence of any desire by the Court to relax the standard of materiality to a mere possibility of influence upon a reasonable investor," on the contrary, it said, "the Court in *Mills* emphasized that the test of materiality required 'a significant *propensity* to affect the voting process', 396 U.S. at 384 (emphasis original)."

It may well be that a "misrepresentation" in a proxy statement has a propensity to affect a shareholder's decision on how he will vote on a corporate transaction. We submit, however, that the same "misrepresentation" has no effect on an investor's decision to buy or sell stock. Management's opinion that a limited tender offer is inadequate cannot be conclusively presumed to affect a shareholder's decision not to tender. That decision is uniquely individual to each shareholder and depends on his financial condition and many other factors. "The price of a stock in the general market is controlled not only by the price-earnings ratios and such other mathematical formulae, but by the intuition or 'hunch' of the buyers

and sellers of the stock. Once this element of pricing is exposed it follows necessarily that the adequacy or inadequacy of price is subjective." *Gulf & Western Industries, Inc.* v. *Great Atlantic & Pacific Tea Co., Inc.,* 356 F. Supp. 1066, 1071 (S.D.N.Y.), *aff'd,* 476 F.2d 687 (2 Cir. 1973).

Here, the District Court found that "inadequate" referred to factors other than price, such as "management's views as to company prospects or as to the quality of Chris-Craft management, should Chris-Craft acquire control" (A-136). The Court of Appeals disagreed. It held the material misrepresentation consisted of not being "more specific" that the inadequacy referred to other factors and not just the price (A-38). Hence, for alleged failure to fulfill "a special responsibility to be meticulous and precise in their representations to shareholders" (*ibid.*) the Piper individuals were found to have violated Section 14(e).

Similarly, the Court of Appeals conclusively presumed that the announcement of the Grumman transaction, without setting forth all the terms, was a material omission upon which shareholders relied in not tendering to Chris-Craft. Although the press release and letter nowhere mentioned Chris-Craft or its tender offer, the Court of Appeals held they were "in effect" in "the nature of counter-solicitations" to Chris-Craft's tender offer (A-33, n. 12).

In *Smallwood* v. *Pearl Brewing Company, supra,* 489 F.2d, at 601, the Fifth Circuit observed that "statements describing an event that has just occurred should be examined under a less powerful glass than similar statements made after a period sufficient for careful study and reflection has passed." See, also, *e.g. Susquehanna Corp.* v. *Pan American Sulphur Co.,* 423 F.2d 1075, 1085 (5 Cir. 1970). The Court of Appeals here, however, parsed the Grumman announcement microscopically (A-39) and held that the Piper individuals violated Section 14(e) by "fail-

ing to disclose with substantial accuracy a transaction which was likely to affect the attitude of Piper [Aircraft] shareholders" towards Chris-Craft's tender offer (A-40). This Court observed in *Blue Chip Stamps* v. *Manor Drug Stores, supra,* 421 U.S., at 746-7, n. 10, however, that "[o]wnership of stock or receipt of a prospectus says little about whether a plaintiff's investment decision was affected by a violation of Rule 10b-5 or whether a decision was even made."

Having relaxed the standard of materiality, the Court of Appeals proceeded to eliminate Chris-Craft's burden of proving the necessary causal connection between the "material misrepresentations" and its injury.

The Ninth Circuit observed in *Royal Air Properties, Inc.* v. *Smith,* 312 F.2d 210, 213 (9 Cir. 1962): "Since civil liability was judicially implied, the appropriate common law defenses should be applicable. It would be inconsistent to apply these defenses to a remedy specifically provided by Congress and not to a remedy judicially inferred from an act of Congress." One of the most traditional of common law defenses is that a defendant only "is liable to respond in such damages as naturally and proximately result from the fraud." *Estate Counseling Service, Inc.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 303 F.2d 527, 533 (10 Cir. 1962).

The principle of causation in fact is a basic element of tort law. A plaintiff "must establish that the deceptive conduct was the cause of the damage," *Adair* v. *Schneider,* 293 F. Supp. 393, 396 (S.D.N.Y. 1968). "Although facts meeting the 'but for' test will not necessarily establish proximate cause, the failure to satisfy that test necessarily negates the possibility of proximate cause. Satisfaction of the 'but for' test is a minimum requirement of proximate causation." *Hoover* v. *Allen,* 241 F. Supp. 213, 231 (S.D.N.Y. 1965).

Here, of course, the Court of Appeals did not require proof that but for the letters to shareholders in January 1969 Chris-Craft would have acquired control of Piper Aircraft. Indeed, it did not even find that Chris-Craft was attempting to obtain control on its cash tender offer. It could not do so because Chris-Craft had expressly stated in its tender offer that it did not have any specific plan or proposal to acquire control of Piper Aircraft and that the purchases were made only for investment with a "view" towards control (B-61).* The Court of Appeals majority was "satisfied" that Chris-Craft had "a desire to purchase, and was capable of purchasing, a substantial number of additional shares pursuant to its tender offer" (A-62). It therefore conclusively presumed that Chris-Craft "was unlawfully denied the opportunity to purchase additional shares" (*ibid.*).

Chris-Craft, however, was not held entitled to be compensated by the Piper individuals for its inability to purchase those additional shares on its tender offer. That was not the injury for which Chris-Craft was awarded $36 million in damages. Its injury, the Court of Appeals held, was the decline in the value of the Piper Aircraft shares "with which it became encumbered" when Bangor Punta acquired control of Piper Aircraft in September 1969 (A-60). "The measure of damages," the Court specifically directed, "should be the reduction in the appraisal value of [Chris-Craft's] Piper [Aircraft] holdings attributable to [Bangor Punta's] taking a majority position and reducing [Chris-Craft] to a minority position" (A-69). This damage formulation completely eliminated as a prerequisite to relief against the Piper individuals any proof that their alleged 14(e) violations in January caused Chris-Craft's injury in September.

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* The draft of Chris-Craft's tender offer originally stated that Chris-Craft "intends through this Offer to acquire control of Piper" (Def. Ex. D; R.Ev. 705; R.1328A). The draft was changed before the tender offer was made (R.1329A).

The elimination of that requirement negated Chris-Craft's admission that despite the alleged violations in January it was still able thereafter either to obtain control or to dispose of its shares without loss and possibly some profit (R.1338A-1340A; R.1556A-1557A). Chris-Craft stipulated at trial that both before and after Chris-Craft closed its cash tender offer on February 3 some shares of stock were available for purchase at less than $65; Chris-Craft did not purchase them (R.272A; R.285A). Chris-Craft admittedly was aware in February 1969 that the Fund of Funds held a substantial number of Piper Aircraft shares; it declined to purchase them (A-115). If funds were available, as the Court of Appeals was "satisfied" was the case, Chris-Craft did not have to proceed by exchange offers in May and July 1969; it could have purchased the shares for cash prior to May; and could have purchased shares for cash after its exchange offer closed in August; alternatively, it could have tendered its shares to Bangor Punta on the Bangor Punta exchange offer. Had Chris-Craft followed any one of those courses it would not have been "encumbered" with a minority bloc of stock in a declining market. It certainly would not have been caused to have suffered over $36 million in damages.

"Under the familiar mitigation of damages principle, a party cannot recover that part of his loss caused by his own failure, once he has reason to know of the breach, to take reasonable steps to avoid further harm." *Foster* v. *Financial Technology Inc.*, 517 F.2d 1068, 1072 (9 Cir. 1975). As stated by Judge Friendly in *Ellerman Lines, Limited* v. *The President Harding*, 288 F.2d 288, 290 (2 Cir. 1961):

> "Perhaps as good a way to state the rule as any is that a tort defendant is not liable for consequences preventable by action that reason requires the plaintiff to take; per contra if the plaintiff takes such action within the range of reason, the defendant is liable for further damages resulting therefrom. It seems unnecessary to follow McCormick, pp. 127-128, and the Restatement, p. 602, in finding the root of this rule in a policy of discouraging persons from 'wasting their resources both physical or economic'; it is enough that the community's notions of fair compensation to an injured plaintiff do not include wounds which in a practical sense are self-inflicted."

Indeed, as the Ninth Circuit stated in *Foster* v. *Financial Technology, supra*, 517 F.2d at 1072, "at the point where a reasonable man—either because of the breach or discovery of the fraud—would have taken action to protect himself from further depreciation in the value of the claim, the chain of causation is cut and plaintiffs cannot recover damages for subsequent losses."

Here, of course, at the time of suit in May 1969 Chris-Craft admittedly had no loss as a result of the January events. "By continuing to hold the stock after that date" Chris-Craft "has, in effect, made a second investment decision unrelated to his initial decision to purchase the stock" *Harris* v. *American Investment Company*, 523 F.2d 220, 228 (8 Cir. 1975), cert. denied, 44 U.S.L.W. 3398 (Jan. 13, 1976). Thus, "what happens after this second decision has no bearing whatsoever on the measure of plaintiff's damages" (*ibid.*).

The Court of Appeals held here that Chris-Craft "was not required to mitigate damages by dropping out of the contest" (A-61). By the same token, it should not have been permitted to magnify its recovery from the Piper individuals by its own actions which the Piper individuals were powerless to prevent. Chris-Craft, by its own admission, had not suffered any decline in the value of the shares it had purchased and could have disposed of those shares without loss and possibly some profit as late as May. Nevertheless, it was permitted to recover from the Piper individuals for injuries self-inflicted months after the alleged violations.

Judge Mansfield in his dissent relied upon this Court's decision in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389 (1970), that "damages should be recoverable only to the extent that they can be shown," and pointed out that Chris-Craft failed to show that it suffered some resulting loss from the January communications (A-113).

The Court of Appeals majority upheld the District Court's finding that Chris-Craft failed to prove it would have acquired control of Piper Aircraft, but permitted Chris-Craft to recover damages solely because Bangor Punta acquired control in September following its alleged violations of Rule 10b-6 and Section 14(e) in May and July. The Piper individuals had nothing to do with either of those alleged violations. Their acts, even if violations in January, did not cause Chris-Craft to lose the control battle in September.

To the extent that Bangor Punta acquired 14% of the stock unlawfully by means of its alleged violations of Rule 10b-6 and Section 14(e) those shares were denied to Chris-Craft. Those transactions, however, occurred three or more months after the tender offer closed. During those months Chris-Craft was free to purchase those shares but declined to do so.*

There is no claim that those shares would have been tendered to Chris-Craft in January were it not for the letters to shareholders. Indeed, there was no evidence that any additional shares would have been tendered

* Chris-Craft argues that once it filed its registration statement for its exchange offer it was precluded from purchasing shares by the SEC's interpretation of Rule 10b-6. The argument is fallacious. It does not even claim to have learned of the SEC's interpretation until April (R.1211A; R.1537A). If, as it now claims, it had cash available, nothing prevented Chris-Craft from purchasing for cash before then and withdrawing the registration statement and purchasing for cash thereafter. This it refused to do.

to Chris-Craft. The Court of Appeals simply presumed that those letters denied Chris-Craft the opportunity to purchase an unspecified number of additional shares on its tender offer (A-62). Nothing said or done by the Piper individuals thereafter was found by any court to have harmed Chris-Craft.

As Judge Mansfield observed in his dissent, by the time Bangor Punta entered the contest in May, whatever presumed effect those January communications imposed upon Chris-Craft's ability to purchase shares had long since been dissipated (A-115). Bangor Punta's subsequent and unrelated activity was the superseding cause of the presumed injury for which Chris-Craft was awarded damages. There is no basis for holding the Piper individuals jointly and severally liable with Bangor Punta for them.

b. By Being Permitted to Recover Damages From the Piper Individuals, Chris-Craft Obtained Greater Protection Than the Shareholders.

As pointed out, the purpose of the Williams Act was to assure that the offeror made adequate disclosure to shareholders when making them a tender offer. Permitting the offeror to sue for damages three months after the tender offer closed, at a time when it admittedly had not suffered any loss, is not consistent with the legislative scheme, nor is it necessary for the protection of investors as a supplement to enforcement by the SEC.

The class for whose benefit the Williams Act was passed are the shareholders of the corporation. It is they who are faced with the decision whether to accept or reject the tender offer. It is they whom Congress sought to insure would have proper disclosure. Undoubtedly there may be tender offers where inadequate or misleading disclosures are made; there is no reason why shareholders should not be entitled to recover damages caused thereby. For ex-

ample, if the offeror fraudulently misrepresents his plans with respect to the company, a shareholder who acted in reliance upon those plans would be entitled to recover damages from the offeror, if he can prove them. Conversely, if management of the target company fraudulently advises shareholders that another offer is forthcoming at a higher price, the shareholders who do not tender should be entitled to sue management for their damages, if any.

In these instances there is a clear causal nexus between the violations and the damages. The legislative purpose underlying Section 14(e) is satisfied since the shareholders are protected by being entitled to damages if, during the tender offer when they are required to make their decision, they are given fraudulent information upon which they base their decision. To award the offeror damages in an action commenced months after the tender offer closed does not serve that function.

This Court has recognized under Rule 10b-5 that a party who did not purchase or sell securities in reliance upon alleged misrepresentations may not recover damages. *Blue Chip Stamps* v. *Manor Drug Stores, supra,* 421 U.S. 723. Such a party, however, may seek an injunction to prevent a threatened violation of Rule 10b-5, *Mutual Shares Corp.* v. *Genesco, Inc.,* 384 F.2d 540, 547 (2 Cir. 1967).

Chris-Craft's complaint was framed as seeking injunctive relief and damages as a shareholder, but was converted into a straight damage claim before trial (A-139, n. 8). On appeal, its claimed damages as a shareholder were dropped (A-21, n. 7). Its recovery was based solely upon the Court of Appeals' "belief that the harm done the defeated contestant is not that it had to pay more for the stock but that it got less stock than it needed for control" (A-33).

In *Blue Chip Stamps* this Court was concerned about suits under Rule 10b-5 by a person who did not purchase or sell stock. The concern was "that the door will be open to recovery of substantial damages on the part of one who

offers only his own testimony to prove that he ever consulted a prospectus of the issuer, that he paid any attention to it, or that the representations contained in it damaged him" (421 U.S., at 746).

In the present case, Chris-Craft's recovery was not based upon any misrepresentations made to it. Rather, its recovery from the Piper individuals stemmed from assumed inaction by shareholders, presumed to have been in reliance upon letters to them in January. There was no testimony from any shareholder that he recived the January letters, that he paid any attention to them or that he did anything in reliance upon them. Instead, the Court of Appeals assumed each of those elements and disregarded all objective facts which demonstrated that a contrary interpretation was more appropriate.

In *Mills* v. *Electric Auto-Lite, supra,* 396 U.S. 375, this Court held that shareholders to whom a misleading proxy statement was issued could sue either for equitable relief or damages. In *Affiliated Ute Citizens* v. *United States,* 406 U.S. 128 (1972), this Court held that shareholders who are deceived into selling their shares may sue the deceivers without positive proof of reliance upon the deception. In both cases, the deception was directed at the plaintiffs. In both cases the plaintiffs were members of the class whose interests were protected by the statute involved, Section 14(a) and Rule 14a-9 in *Mills* and Section 10(b) and Rule 10b-5 in *Affiliated Ute.*

Under the Williams Act the shareholders, not the offeror and not management, were the object of Congressional concern. Only last term this Court observed in *Rondeau* v. *Mosinee Paper Corp., supra,* 422 U.S., at 58:

> "The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party."

As in *Blue Chip Stamps* v. *Manor Drug Stores, supra,* 421 U.S., at 741, the courts "are dealing with a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question." An argument can be made that both the offeror and management be entitled to seek injunctive relief, while the tender offer is still open, to prevent misleading solicitations or counter-solicitations of shareholders. See, *e.g. Missouri Portland Cement Co., Inc.* v. *Cargill, Incorporated,* 498 F.2d 851, 873-75 (2 Cir.), cert. denied, 419 U.S. 883 (1974); *Gulf & Western Industries, Inc.* v. *Great Atlantic & Pacific Tea Co., Inc., supra,* 476 F.2d, at 695-96; *Butler Aviation International, Inc.* v. *Comprehensive Designers, Inc.,* 425 F.2d 842, 843 (2 Cir. 1970); *Electronic Specialty Co.* v. *International Controls Corp.,* 409 F.2d 937, 945 (2 Cir. 1969); *Cauble* v. *White* 360 F. Supp. 1021, 1029 (E.D. La. 1973). Once the offer closes, however, it is the shareholders not the offeror who should complain if they were injured by the countersolicitations of management. The Williams Act "was designed to protect cash tender offerees, not offerors." *Klaus* v. *Hi-Shear Corporation,* 528 F.2d 225, 232 (9 Cir. 1975). Their silence objectively demonstrates that they were not injured. "No violation of 14(e) could be shown where the class sought to be protected has not been harmed." *Sargent* v. *Genesco, Inc.,* 492 F.2d 750, 769 (5 Cir. 1974).

Even if we assume that the Court of Appeals was correct and that management's opinion that the tender offer was inadequate and not setting forth all the terms of the Grumman transaction constituted material misrepresentations upon which shareholders relied, the shareholders were not injured. The Piper Aircraft shareholders who refused to accept Chris-Craft's $65 tender offer were able to sell their shares for more than $65 shortly after the offer closed (R.651A) and were offered substantially more under both

the Chris-Craft and Bangor Punta exchange offers. As the District Court found, "in terms of price to tendering shareholders" Piper Aircraft management's "efforts to procure a better alternative" for shareholders were "successful" (A-136). Its opinion that the tender offer was inadequate, even assuming that the statement referred to the price, was proven to be factually correct.

A Piper Aircraft shareholder, claiming under Section 14(e) that he was misled into not tendering to Chris-Craft in January, would not have had any damages had he sued in May 1969. By May 1969 Piper Aircraft shares were selling for substantially more than $65 per share and sold for over $80 per share in August (R.652A, R.654A). Nevertheless, the Court of Appeals construed Section 14(e) to permit Chris-Craft to recover $36 million in damages against the Piper individuals even though the shareholders, the class for whose benefit the statute was enacted, could not have claimed damages from them for the January events.

Chris-Craft's action was brought three months after its tender offer closed and only after Chris-Craft found that Bangor Punta "seemed to be succeeding" (R.1340A) in its efforts to acquire control. "The purpose of the Securities Exchange Act" said the Ninth Circuit in *Royal Air Properties, Inc.* v. *Smith, supra,* 312 F.2d, at 213-214, "is to protect the innocent investor, not one who loses his innocence and then waits to see how his investment turns out before he decides to invoke the provisions of the Act."

c. The Direction to Enter Joint and Several Liability Penalizes Management and Tips the Balance of Regulation in Favor of the Offeror to the Detriment of Shareholders.

As Judge Friendly pointed out in *Electronic Specialty Co.* v. *International Controls Corp., supra,* 409 F.2d, at 945, "in contests for control the management has a role to play as such and not merely insofar as the managers

are stockholders." [Quoting from *Studebaker Corp.* v. *Gittlin*, 360 F.2d 692, 695 (2 Cir. 1966)]. In *Rondeau* v. *Mosinee Paper Corp., supra*, this Court recognized that the Williams Act did not curtail that role. "Congress intended to do no more than give incumbent management an opportunity to express and explain its position" 422 U.S., at 58. Senator Williams himself stated when his bill was passed by the Senate in 1967: "S.510 is designed solely to require full and fair disclosure for the benefit of investors. The bill will at the same time provide the offeror and management equal opportunity to present their case." 113 Cong. Rec. 24664 (1967).

Under the Williams Act, the SEC was authorized by Section 14(d)(4) to prescribe rules and regulations concerning recommendations to shareholders to accept or reject the tender offer. The SEC's regulations in effect in January 1969 concerning recommendations to reject a tender offer required filing a Schedule 14D and furnishing the information required by Items 1(b) and 2(b) of Schedule 14D. Rule 14d-4, 17 C.F.R. § 240.14d-4 (1968). No claim is made that these requirements were not complied with. The pertinent information required by Items 1(b) and 2(b) were the identity of the tender offer and "the reasons for the solicitation or recommendation to security holders to accept or reject such tender offer." Rule 14d-101, 17 C.F.R. § 240.14d-101 (1968).

Hence, management clearly has a role in tender offers. Indeed, in January 1969 shareholders of many corporations were confronted with a rash of tender offers accompanied by a proliferation of letters to shareholders and litigation—by both sides—attacking and defending the tender offers.

Judge Friendly observed in *Electronic Specialty Co., supra*, 409 F.2d, at 948, tender offers are contests. "This means that the participants on both sides act, not 'in the peace of a quiet chamber,' . . . but under the stresses of the

market place. They act quickly, sometimes impulsively, often in angry response to what they consider, whether rightly or wrongly, to be low blows by the other side. Probably there will no more be a perfect tender offer than a perfect trial."•

In *Armour and Company* v. *General Host Corporation*, 296 F. Supp. 470, 475 (S.D.N.Y. 1969) Judge Weinfeld refused to enjoin an exchange offer, noting:

> "The stockholders are entitled to exercise their own judgment as to these matters. The plaintiffs' contention that the exchange offer is highly speculative and otherwise undesirable for Armour stockholders has, as noted, been extensively publicized. The Armour stockholders are aware of plaintiffs' claims of the alleged speculative nature of the securities being offered and the alleged shortcomings of the General Host proposal. The decision whether to buy, exchange, or do neither should rest with each individual stockholder."

Here the Piper Aircraft shareholders made their decision during Chris-Craft's tender offer in January. It was not until more than three months later, after Bangor Punta entered the contest and "seemed to be succeeding" (R.1340A), that Chris-Craft claimed it was injured.

There is no suggestion in the record that the Piper individuals should have foreseen in January that Bangor Punta would succeed in acquiring control of Piper Air-

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• The conduct alleged in *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F.2d 963, 966 (2 Cir. 1969), cert. denied, 399 U.S. 909 (1970), was far more reprehensible than that charged against the Piper individuals here, yet the court refused to create a federal remedy since plaintiff could sue in the state courts. Judge Timbers expressed improper concern here that denying standing to Chris-Craft would "extinguish a liability" (A-30). See also, *Armour and Company* v. *General Host Corporation*, 296 F. Supp. 470, 474 (S.D.N.Y. 1969), for another description of management's conduct during a contested takeover in January 1969.

craft seven months later after allegedly violating the 1934 Act. Nor is there any finding that the Piper individuals were aware of or participated in those alleged violations. Hence, even assuming that the January letters were violations of Section 14(e), Bangor Punta's subsequent conduct intervened and was a superseding cause of Chris-Craft's claimed injury. The Piper individuals should have been free of any liability to Chris-Craft.

This result is particularly appropriate in this case. The $36 million judgment in Chris-Craft's favor is not intended to compensate Chris-Craft for the January events. The Court of Appeals never considered, or permitted the District Court to consider, whether the January events caused compensable injury to Chris-Craft. Nor did the Court of Appeals permit the District Court to consider whether the Piper individuals should be held personally liable—it reached that determination in a footnote in its opinion (A-68, n. 31)—despite the finding by the District Court that Chris-Craft's complaint against the Piper individuals should be dismissed *"a fortiori"* because Piper Aircraft was not liable (A-161).

The Court of Appeals thus refused to consider the basic principle that even joint tortfeasors cannot be held jointly and severally liable when their acts cause distinct and separable injuries. "Damages for harm are to be apportioned among two or more causes where (a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm." Restatement, Second, Torts § 433A.*

Chris-Craft suggests that since the January events denied it the opportunity to purchase more shares on its

* As Dean Prosser states: "Where two or more causes combine to produce . . . *a single result, incapable of any logical division,* each may be a substantial factor in bringing about the loss, and if so, each must be charged with all of it." Prosser, Law of Torts 315-16 (4th Ed. 1971), emphasis supplied. As pointed out, of course, even if there were only a single harm, it was capable of logical division.

tender offer (but in any event not enough to give it control), Bangor Punta was able to enter the contest in May and, through its own subsequent purchases, acquire sufficient shares by September to give it control. If there were validity to this theory, at most the parties would be successive tortfeasors bringing about distinct and separate injuries. In such a case damages should be apportioned.

The Court of Appeals assumed, however, that Chris-Craft suffered only a single harm, *i.e.* a reduction in the value of its Piper Aircraft holdings when Bangor Punta acquired control. The "contribution," if any, of the Piper individuals to that harm—presumably deterring shareholders from tendering to Chris-Craft in January—is clearly distinct and logically separable.

At trial the evidence demonstrated that Chris-Craft was not seeking control of Piper Aircraft for cash on its tender offer. To the contrary, the District Court found that Chris-Craft's "commitment to seeking long term investment in and control of Piper [Aircraft] came later, under compulsion" (B-61). Indeed, the parties stipulated at trial that shares were available both during and after the tender offer for less than $65 per share. Chris-Craft did not purchase them (R.285A).*

Moreover, even if contrary to Chris-Craft's Schedule 14D it did plan to acquire control for cash on its January tender offer, it would have cost Chris-Craft 43.11% per year to borrow sufficient cash to have purchased the requisite number of shares (A-114). Thus, the record shows that Chris-Craft actually suffered no harm as a result of the January events. Nothing done by the Piper individuals thereafter harmed Chris-Craft. As Judge Mans-

* The Court of Appeals majority's explanation for why Chris-Craft did not make such purchases (A-62) was of its own creation. Judge Mansfield in his dissent referred to the explanation as a "hypothesized desire" (A-115). Not even Chris-Craft offered that excuse in the courts below.

field pointed out in his dissent, in a financial sense Chris-Craft had "shot its bolt" by early February 1969. It was "thereafter relegated in its quest for control of Piper [Aircraft] to the use of exchange offers" (A-114).

The Court of Appeals majority, however, made what Judge Mansfield called the "fanciful assumption" that the January letters "undoubtedly . . . influenced" Piper Aircraft shareholders against accepting Chris-Craft's later exchange offers "by casting a general pall of unfairness" over Chris-Craft's reputation (A-115).* This "rank speculation" could not overcome the undisputed fact that the Piper individuals did not participate in or have any knowledge of Bangor Punta's subsequent alleged violations.

The Court of Appeals' construction of Section 14(e) thus assures that persons making takeover bids have an insurance policy should they fail to get control. If management acts in the interests of all shareholders, the corporation may have to pay. How that protects investors is impossible to discern. See A-159 to A-161; see also *H.K. Porter Company, Inc.* v. *Nicholson File Co.*, 482 F.2d 421, 424-5 (1 Cir. 1973). Here, the Court of Appeals, in a footnote (A-68, n. 31), held that the Piper individuals acted only in their own interests and did not have to face the issue.** Should that ruling stand, however, in future takeovers management's first interest will have to be its own rather than those of the shareholders. The result may well be either

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* The fact that between the close of Chris-Craft's tender offer on February 3 and the opening of its exchange offer on May 19 over 2 million shares of Piper Aircraft stock traded on the New York Stock Exchange (R.651A-652A) hardly suggests that shareholders were relying on anything said by Piper Aircraft's management.

** The court never explained the basis for that finding. Since Chris-Craft had offered employment contracts to the Piper individuals and other members of management (R.2060A-2061A), it is difficult to perceive how management can ever avoid being charged with acting in their own interests if they are also shareholders.

silence or bland pronouncements with less effort made to find a better alternative for shareholders. This surely will not assure that shareholders receive adequate information upon which to base their decision when confronted with a tender offer.

The result of the Court of Appeals' decision will be to muzzle management in future takeover battles, contrary to the express intent of the Williams Act. Any member of management would be foolhardy indeed were he to resist a takeover knowing that, if the offeror is unsuccessful, he can with the benefit of hindsight find a minor misstep and recover his entire cost from management personally even if the shareholders themselves benefit from the resistance. It is no answer to say that the purpose of the Williams Act is to assure that tender offers should proceed fairly. The Piper individuals are not paying for their presumed wrongful conduct on Chris-Craft's tender offer, but for Bangor Punta's alleged violations months later.

If management is to have a role to play in tender offers, we submit that some limitations must be imposed upon an implied right of action under Section 14(e). When management in the honest exercise of its judgment believes that a takeover would not be in the interests of shareholders, it should not be penalized if the competitor they invite in violates the law without their knowledge. If, in the course of their resistance, management acts wrongfully, it should be liable to the shareholders injured by their actions. But if the shareholders benefit from the resistance, the Congressional purpose behind the Williams Act is not satisfied by penalizing management at the behest of the company losing the takeover bid.

In *Kern County Land Co.* v. *Occidental Petroleum Corp.*, 411 U.S. 582, 594-5 (1973), this Court observed in connection with Section 16(b) of the 1934 Act

> "In deciding whether borderline transactions are within the reach of the statute, the courts have come

> to inquire whether the transaction may serve as a vehicle for the evil which Congress sought to prevent * * * thereby endeavoring to implement congressional objectives without extending the reach of the statute beyond its intended limits."

Under the Williams Act, the evil to be prevented is that shareholders may have to make uninformed decisions when confronted with a tender offer. To hold management liable in perpetuity for a misstep early in the contest does not implement that objective, it frustrates it. Future managements will hesitate to express their views and will curtail their efforts to procure a better alternative.

In this case, for example, the Court of Appeals declared that it found "no fault in the Piper family's effort to avert through a Grumman merger what they had concluded was an unfavorable takeover by [Chris-Craft]. Such a maneuver is a common response to a takeover attempt" (A-39). The District Court found that management's "efforts to procure a better alternative for Piper [Aircraft] shareholders" were made "and were, in terms of price to tendering shareholders, successful" (A-136). Nevertheless, the Piper individuals were held personally liable, jointly and severally, with Bangor Punta on the speculation that their January violations "contributed" to Bangor Punta's later success. Such a distortion of Section 14(e) is unwarranted and should be reversed.

d. The Award of Over $36 Million in Damages Violates the Requirement of Section 28(a) of the 1934 Act That Only "Actual Damages on Account of the Act Complained of" May be Recovered.

Sending the letters of January 27 and 28, which expressed the opinion of Piper Aircraft's Board that the Chris-Craft tender offer was inadequate, and issuing the press release and letter of January 29 concerning the

Grumman transaction, were the only violations of Section 14(e) by the Piper individuals which the Court of Appeals found caused harm to Chris-Craft.* That harm was the presumed denial to Chris-Craft of the "opportunity to purchase additional shares" on its tender offer (A-62). Under Section 28(a) of the 1934 Act the Piper individuals could only be liable to Chris-Craft for the "actual damages on account of the act complained of."

One need not pause long to consider why Chris-Craft never attempted to establish such damages; there were none. Chris-Craft could not have purchased significant additional shares for cash in January and would have had to pay 43.11% per annum to borrow the cash. By its own admissions, Chris-Craft could have disposed of the shares it purchased at least as late as May, without loss and possibly some profit (R.1338A-1340A; R.1556A-1557A). Hence, even if the January events were violative of Section 14(e) they did not damage Chris-Craft. On this basis alone, the decision of the Court of Appeals must be reversed.

The fifteenfold increase in damages awarded by the Court of Appeals after the remand was a complete abandonment of its original damage formulation. It was not predicated on the reduction in value of Chris-Craft's shares attributable to Bangor Punta gaining control, but rather on the difference between Chris-Craft's average cost per share and the price Chris-Craft hypothetically would have received had it sold its shares in January 1970. This revised formulation results in a reimbursement to Chris-Craft of the premium over the market which it paid before any of the alleged 14(e) violations occurred. It also results in a payment to Chris-Craft covering the decline in

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* The Piper Aircraft letters of June and July 1969 recommending in favor of Bangor Punta's exchange offer and against Chris-Craft's exchange offer were also found by the Court of Appeals to violate Section 14(e), but caused no harm to Chris-Craft (A-63).

market values occurring between January 1969 and January 1970, a period when the market took a precipitous drop.

The Court of Appeals recognized that by its award it was "shifting the entire burden of [Chris-Craft's] loss to defendants" (B-27). In so doing, the Court of Appeals rewarded Chris-Craft, which spent $44 million to acquire its shares (A-18), by giving it over $36 million in compensatory damages and the benefit of a five year injunction against Bangor Punta voting over 200,000 of its shares. Chris-Craft retains its shares, however, and can sell them at a time of its own choosing. This result does violence to the requirement of Section 28(a) that no plaintiff may recover "a total amount in excess of his actual damages."

Although the Court of Appeals affirmed the District Court's finding that Chris-Craft failed to prove it would have obtained control of Piper Aircraft, its damage formulation overcompensates Chris-Craft. For example, the court did not consider how much more Chris-Craft would have had to pay to acquire additional shares with no assurance that it would gain control. The Court did not consider how much of its damage award covers "the expected fruits of an unrealized speculation," which the First Circuit condemned as an element of damages in *Janigan* v. *Taylor*, 344 F.2d 781, 786 (1 Cir.), cert. denied, 382 U.S. 879 (1965). Nor did the court consider how much Chris-Craft would have received had it sold its shares after its tender offer and before Bangor Punta's purchases in May.

Chris-Craft did not claim any Section 14(e) violations by the Piper individuals during or at the conclusion of its cash tender offer. In fact it publicly stated that its tender offer was concluded successfully (R.282A) and its Vice President and counsel stated in a sworn affidavit executed in March 1969 that shareholders were not deterred from

tendering to Chris-Craft on its tender offer (R.1338A). It was not until Chris-Craft read published reports that Bangor Punta had purchased a large block of shares in mid-May 1969 that Chris-Craft began to believe that it might not get control (R.1340A). It was only then, on May 22, 1969, that Chris-Craft brought suit (R.1226A-1228A).

In the face of such a record, it is inconceivable how assessing damages of more than $36 million against the Piper individuals amounts to anything but the unlawful award of punitive not actual damages.*

To further compound the injustice, Chris-Craft's damages were not calculated as of January 1969, the time of the alleged Section 14(e) violations by the Piper individuals, or May 1969, the time of suit, or September 1969, when Bangor Punta achieved control, but January 1970, the time that one of Chris-Craft's witnesses thought Chris-Craft would have available a registration statement for a public offering (B-29).

In *Foster* v. *Financial Technology Inc., supra,* 517 F.2d, at 1072, the Ninth Circuit did not allow market forces to enhance damages, declaring that "damages are limited by what [plaintiffs] would have realized if they had acted upon their claim when they first learned of the fraud or had reason to know of it." In such a case, "plaintiff will not be able to avail himself of any further decrease in the value of the security after that date." *Cant* v. *A.G. Becker & Co., Inc.,* 379 F. Supp. 972, 975 (N.D. Ill. 1974). See also *Harris* v. *American Investment Company, supra,* 523 F.2d, at 228. Here, of course, Chris-Craft admittedly would have realized a profit, or at least no loss,

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* Punitive damages may not be awarded under Section 28(a). See, *Richardson* v. *MacArthur,* 451 F.2d 35, 43 (10 Cir. 1971); *Myzel* v. *Fields,* 386 F.2d 718, 748 (8 Cir. 1967), cert. denied, 390 U.S. 951 (1968); *Globus* v. *Law Research Service, Inc.,* 418 F.2d 1276, 1286 (2 Cir. 1969), cert. denied, 397 U.S. 913 (1970).

had it competed in the market place rather than in the courts. Instead, it has had the Court of Appeals "assess many millions of dollars of damages in the form of a bail-out of Chris-Craft from its misadventure in Piper" Aircraft stock (A-160).

Conclusion

The Piper individuals acted in the interests of all shareholders when they and the other members of Piper Aircraft's Board of Directors recommended against accepting Chris-Craft's cash tender offer. They committed no violations of Section 14(e), nor was Chris-Craft injured by failing to purchase additional shares on its tender offer. The District Court after hearing all the evidence properly dismissed Chris-Craft's complaint against them. In reversing the District Court, the Court of Appeals awarded relief by discarding traditional principles and assessed punitive rather than actual damages. For these reasons the judgment of the Court of Appeals should be reversed and the judgment of the District Court dismissing the complaint against the Piper individuals should be reinstated.

Respectfully submitted,

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CHRONOLOGY OF PURCHASES OF PIPER AIRCRAFT SHARES

During the relevant time period the total number of Piper shares outstanding was 1,644,790.

DATE	EVENT
Dec. 30, 1968	Chris-Craft makes first purchase of Piper Aircraft shares or NYSE.
Jan. 21, 1969	Chris-Craft's purchases to date total 102,600 Piper Aircraft shares, or 6.2%.
Jan. 22, 1969	Chris-Craft purchases 101,100 Piper Aircraft shares from Technology Fund. Now owns 203,700 shares, or 12.4%.
Jan. 23, 1969	Chris-Craft announces cash tender offer.
Jan. 24-Feb. 2, 1969	Chris-Craft purchases an additional 38,800 Piper Aircraft shares on NYSE. Now owns 242,500, or 14.7%.
Feb. 3, 1969	Chris-Craft cash tender offer expires with 304,606 Piper Aircraft shares tendered. Now owns 547,106 Piper Aircraft shares, or 33.3%.
Feb. 27, 1969	Chris-Craft files S-1 for exchange offer.
Mar. 18-Apr. 1, 1969	Chris-Craft purchases 9,100 additional Piper Aircraft shares on NYSE. Now owns 556,206 Piper Aircraft shares, or 33.8%.
May 8, 1969	Bangor Punta agrees to purchase 501,090 shares, or 30.5%, from members of the Piper family.

Date	Event
May 14-23, 1969	Bangor Punta purchases 120,200 Piper Aircraft shares, or 7.3%. Now has 621,290 shares, or 37.8%.
May 19, 1969	Chris-Craft exchange offer effective for minimum of 80,000 shares. Only 39,286 shares were tendered and none were accepted.
July 18, 1969	Bangor Punta exchange offer effective.
July 24, 1969	Chris-Craft second exchange offer for up to 300,000 shares, with no minimum, effective.
July 29, 1969	Bangor Punta exchange offer expires with 110,802 shares, or 6.7%, tendered. Now owns 732,092 shares, or 44.5%.
Aug. 4, 1969	Chris-Craft second exchange offer expires with 112,089 Piper Aircraft shares tendered. Now owns 668,295 shares, or 40.6%.
Aug. 7, 1969	Bangor Punta shareholders approve exchange offer.
Aug. 8, 1969	Bangor Punta begins open market purchases of Piper Aircraft shares.
Aug. 12, 1969	Chris-Craft resumes open market purchases of Piper Aircraft shares.
Aug. 18, 1969	Chris-Craft ceases its purchases of Piper Aircraft shares after acquiring 29,200 additional shares, now owning 697,495 shares, or 42.4%.
Sept. 5, 1969	Bangor Punta acquires an additional 100,614 shares through open market purchases and owns 832,706 shares, or 50.6%.

(b) Piper Family

CCI's charges against the Piper family stem from a series of communications to Piper shareholders in the form of shareholder letters and a press release.

The shareholder letters dated Januury 27 and 28, sent while the CCI tender offer was pending, stated that the Piper Board of Directors had "carefully studied this offer and is convinced that it is inadequate and not in the best interests of Piper's shareholders". It further stated that, if CCI were suddenly willing to offer shareholders $65, it must believe that Piper stock is worth more than it is offering.[15] CCI contends that a reasonable shareholder

15 The letter also stated that Piper was talking to major industrial corporations about combination and that if one could be put through, "[A] higher value could be realized for all shareholders." This was not misleading because Piper officials were trying to find an alternative, such as a merger, that would be better for themselves and Piper shareholders. The letter also urged shareholders to consider "important points" such as the facts that "Piper's sales increased more than 20% in fiscal 1968 over the prior year, and its earnings per share were approximately 29% higher." CCI maintains that they should also have disclosed that sales and earnings for the first quarter of the next fiscal year were down considerably compared to the first quarter of the previous year. We cannot say that, once Piper mentioned sales and earnings figures, it was required to reveal all relevant figures. Nor can we say that the decline was so severe that it made the previous year sales and earnings figures deceptive.

would have assumed that "inadequate" referred to price. At that time Piper stock was selling on the market for considerably less than $65 per share. First Boston in fact had given Piper its opinion that the price offered was "fair and equitable". The Piper corporation itself, acting through the Piper family, at that time was contemplating a large sale of Piper stock to Grumman at the same price.

The district court concluded that "inadequate" referred to factors other than price, such as the quality of Chris-Craft management. We disagree. A reasonable shareholder reading the letter most likely would assume that the reference was to price. Since price usually is what a person contemplating a sale of shares is most concerned with, a prudent shareholder naturally would assume that the Piper family was addressing itself to that consideration in opposing the offer. If the Piper family intended to refer to other factors, it surely would have been more specific. The Piper family's culpability regarding these shareholder letters is clear. Corporate officers and directors in their relations with shareholders owe a high fiduciary duty of honesty and fair dealing. See *Swanson* v. *American Consumer Industries, Inc.*, 415 F.2d 1326 (7 Cir. 1969). By reason of the special relationship between them, shareholders are likely to rely heavily upon the representations of corporate insiders when the shareholders find themselves in the midst of a battle for control. Corporate insiders therefore have a special responsibility to be meticulous and precise in their representations to shareholders. The Piper family obviously disregarded this obligation when they sent out these shareholder letters knowing that they were materially misleading.

CCI also attacks the press release of January 29 by Piper officials that Grumman had "agreed to purchase" 300,000 shares of Piper at $65 per share. CCI argues that the tentative nature of the January 25 agreement was not adequately disclosed in the release. The agreement permitted Grumman to return the entire 300,000 shares for a refund of its purchase price plus interest within six months. This "put" provision was not disclosed in the press release, although it was described in Piper's application for listing with the NYSE. The release did reveal that the agreement was subject to the approval of the Piper and Grumman boards as well as other conditions. The published list of conditions gave the appearance of being exclusive, thus solidifying the impression that the sale was all but formally completed.

We find no fault in the Piper family's effort to avert through a Grumman merger what they had concluded was an unfavorable takeover by CCI. Such a maneuver is a common response to a takeover attempt. See Schmultz & Kelly, *Cash Take-Over Bids—Defense Tactics*, 23 Bus. Law 115, 132-34 (1967). We also agree with the district court's conclusions that the agreement was not a "sham" and that the "put" was a rational and logical part of the agreement. But Piper's failure to describe the put in its press release, or in its subsequent letter to shareholders, constituted a material omission in violation of §14(e). By failing to disclose this provision, the release portrayed the Grumman agreement as a completed, favorable deal between Piper and Grumman which also was likely to provide a basis for further and more profitable relations between the two companies.[16] The "agreement" actually was

16 This depiction of the agreement was further suggested by a statement in the release that the "purchase provides an opportunity for Grumman and Piper to study the feasibility and advantages of a possible combination of the two companies."

a preliminary and conditional overture directed toward a possible merger. The Piper family recklessly disregarded its obligation to shareholders in failing to disclose with substantial accuracy a transaction which was likely to affect the attitude of Piper shareholders toward the CCI tender offer.

CCI also challenges the shareholder letters with respect to the BPC and CCI exchange offers on the ground that they failed to disclose the Piper family's financial interest in the success of the BPC general exchange offer. Letters dated June 4 and July 25 urged Piper shareholders to accept the BPC exchange offer. A June 20 letter disparaged the CCI exchange offer. All the letters were sent over the signature of W. T. Piper, Jr. None of the letters explained that, under the terms of the May 8 agreement between BPC and the Piper family, the Piper family might profit handsomely from BPC's acquiring a controlling interest in Piper.[17] The agreement provided, as stated above, that, if the value of the securities package traded to the Piper family for their Piper holdings was below $80 per Piper share on the effective date of the general exchange offer, BPC would make up the difference, *if* BPC were successful in obtaining over 50% of the outstanding Piper shares. The Piper family therefore potentially had an interest in the success of the BPC exchange offer. By July 25, they must have realized that this interest amounted to a considerable sum of money.[18] If the letters merely had sup-

17 The preliminary and final prospectus for the BPC general exchange offer disclosed that there had been an exchange offer made to the Piper family and related that under the May 8 agreement the family might gain from the success of the general exchange offer. We do not believe under the circumstances that disclosure in a detailed and extremely complex prospectus, which did not accompany the letters, fulfilled the Piper family's duty to reveal this material fact. Cf. *Mills* v. *Electric Auto-Lite Co.*, 403 F.2d 429, 433 (7 Cir. 1968), *vacated and remanded*, 396 U.S. 375 (1970).

18 One estimate placed the amount at a total of $13 million.

plemented the prospectus in providing publicity for the terms of the offer, there might be less basis for concern that the Piper family's self-interest was not disclosed. But the letters are replete with the personal opinions and recommendations of W. T. Piper, Jr. on the quality of the BPC securities and the management of BPC. The July 25 letter, sent after the Piper family must have known what they stood to gain in the event of a successful BPC takeover, stated that "we strongly recommend" the offer and "we have been impressed with the management and operations of Bangor Punta". Under these circumstances, the Piper shareholders were entitled to receive information sufficient to make an informed judgment on the weight to be given the personal recommendations of the Piper family. Cf. *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 197-201 (1963).

We hold that the communications to Piper shareholders in the form of shareholder letters and a press release constituted violations of §14(e) by the Piper family defendants.

The Piper family's violations also caused injury to CCI. Piper contends that since CCI was not able and willing to accept any more shares than it did accept as a result of the cash tender offer, the January letters to shareholders and the Grumman press release were harmless. The evidence does not support this contention.

Since CCI had decided by the time of the cash tender offer that its objective was to win control of Piper, it clearly was willing to accept as many shares as it could obtain. While it was ready to commit itself to purchase only 300,000 shares, that limitation does not indicate that it would not accept a substantial number of additional shares if tendered.[27] Indeed, it expressly reserved the right to purchase more than the 300,000 shares.[27a] And although Piper offered some evidence indicating that CCI might have trouble

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27 Mr. Gordon testified, when asked why CCI had committed itself to purchase no more than 300,000 shares, that one reason was that "[w]e did not want . . . Piper to emphasize the fact that the financing for the shares beyond 300,000 had not yet been arranged—to emphasize that successfully, because we knew we could arrange it, but we didn't have it at that time."

27a Officers of CCI announced to the press that the tender offer was successful. The Piper family would have us construe this announcement as a concession that CCI did not expect or desire more from its cash tender offer. As is well known, such statements in this context often are made for the sake of appearance. We decline to ascribe to them the interpretation suggested by the Piper family.

financing additional purchases, it appears that such financing was available. Mr. Gordon testified that, before the cash tender offer had expired, he had arranged with Burnham & Co. to borrow up to $22,000,000 if needed to purchase shares in excess of 300,000. Moreover, the fact that CCI bought only a few shares of Piper on the market after the termination of its cash tender offer is of little probative value. There are many possible explanations for this consistent with CCI's position that it would have purchased additional shares pursuant to the cash tender offer. For example, CCI might have been avoiding the expense of searching out small blocks of shares and the high transactional costs involved in purchasing them. We are satisfied that CCI had a desire to purchase, and was capable of purchasing, a substantial number of additional shares pursuant to its tender offer.

The January letters to shareholders and the Grumman press release misled the Piper shareholders into believing that CCI's tender offer was undesirable. CCI's tender offer could be fruitful only if Piper shareholders believed that the price was currently a fair one and would remain so for at least a reasonable period in the future. The fairness of the offer is demonstrated by the fact that, despite the misrepresentations of the Piper family, over 300,000 shares were tendered. Considering the soundness of the offer and the materiality of the Piper family's deceptions, it is a reasonable presumption that CCI was unlawfully denied the opportunity to purchase additional shares. See *Crane Co.* v. *Westinghouse Air Brake Co., supra,* 419 F.2d at 797. Moreover, these misleading statements most likely had a continuing adverse effect on CCI's attempts to acquire Piper shares. When Piper shareholders were deciding whether or not to accept CCI's exchange offer, many undoubtedly remembered and were influenced by the Piper

family's misleading January statements portraying CCI as a company that made inadequate and unfair offers.

We hold that, considering the narrow margin of victory here, the Piper family's misstatements and omissions in the January shareholder letters and the Grumman press release denied to CCI a fair opportunity to win the contest for control.

The June and July letters to Piper shareholders are a different matter. Although they omitted any reference to the arrangement between the Piper family and BPC whereby the family might gain a considerable amount of money if BPC were to be successful in gaining control of Piper, CCI protected itself against injury from such omission by sending letters to all Piper shareholders on June 16 exposing this non-disclosure by the Piper family. The nature of the Piper family's personal stake in the exchange offer was fully described. We therefore conclude that this omission was rendered harmless.

We hold that the record establishes that the injuries sustained by CCI were caused by the violations of the securities laws by BPC and its named officers, First Boston and its named officers and members of the Piper family.

(1) *Damages*

Piper has come under the dominance of BPC, with many of its management positions being assumed by BPC officers. It has been operated that way for two or three years. Divestiture of the ill-gotten shares would not be appropriate under the circumstances of this case because it would be difficult to administer and would unnecessarily reopen the control battle. CCI understandably no longer desires to take control of a company that has been substantially changed. It seeks damages.

We have held that the unlawful conduct of the Piper family,[31] of BPC and its named officers, and of First Boston

31 The Piper Aircraft Corporation itself was not a perpetrator of th violations of the securities laws. The evidence shows that members o the Piper family acted not on behalf of the corporation in committing their illegal acts, but in their own individual interests. The district court correctly characterized Piper as "the prize in the battle, not a contender". 337 F.Supp. at 1146. We agree that no liability is to be imposed on the Piper Aircraft Corporation.

and its named officers has caused financial loss to CCI for which it should be compensated. The measure of damages should be the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority position and reducing CCI to a minority position, and thus being able to compel a merger at any time. Since the conduct of each of the defendants, through their violations of the securities laws, contributed to the success of BPC's takeover attempt, a judgment should be entered assessing damages against all defendants jointly and severally. See Section 18(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78r(b) (1970).

[Mansfield, C.J., Concurring and Dissenting Opinion]

The Piper Family Defendants

I concur in the conclusion that the Piper family defendants did not become liable to CCI by virtue of their participation in the May 8th press release announcing the BPC exchange offer. The statement of predicted value contained

in the release was not a material representation since the specific terms were contained in the registration statement filed shortly thereafter and the actual value of the package appeared as soon as the exchange offer became effective. I therefore find it unnecessary to decide whether a reasonable investor would have construed the $80 promised value to refer to market price of the security or to an appraisal of BPC's assets and earnings, or whether the archetypical investor should have been expected to make this differentiation from the bare words of the press release.

I also concur in the majority view that CCI has not proved its claim based upon the letters sent by the Piper family to Piper shareholders in June and July, 1969. Although these letters failed to mention the arrangement with BPC whereby the Piper family might gain a huge profit if BPC succeeded in acquiring control of the Piper Company, CCI promptly furnished the essential information to all Piper stockholders on June 16, 1969, before the BPC tender offer became effective. In view of the latter communication no reasonable investor would have accepted BPC's tender offer, which went into effect on July 18, 1969, in reliance upon the Piper family letters.

I must dissent, however, from the majority's failure to accord similar treatment to the claim based on the earlier letters written by the Piper family to Piper stockholders on January 27 and 28, 1969, and to the January 29 press release. I agree that these letters and press release were materially misleading and that a reasonable investor would have considered them important in deciding whether to accept or reject CCI's cash tender offer. Under the *Mills-Ute* test positive proof of reliance was unnecessary to establish causation. However, proof of damages is a separate question and requires more. As the Supreme Court stated in *Mills* v. *Electric Auto-Lite, supra* at 388-89:

> "On the other hand, where, as here, the misleading aspect of the solicitation did not relate to terms of the merger, monetary relief might be afforded to the shareholders only if the merger resulted in a reduction of the earnings or earnings potential of their holdings. In short, *damages should be recoverable only to the extent that they can be shown.*" (Emphasis supplied)

Applying this principle, CCI must show that it suffered some resulting loss. This it has failed to do. In making the January cash tender offer it agreed to purchase up to 300,000 Piper shares if tendered by February 3, 1969, and the district court found that it was not seeking more. 304,606 shares were tendered and purchased by CCI. Thus CCI exceeded its goal. It got more shares than it agreed to buy. No loss was suffered. Indeed it publicly stated that the cash tender offer had been a success.

Although CCI reserved the right to purchase more than 300,000 shares, it did not have sufficient funds to purchase any significant amount in excess of 300,000. Nor had "financing for . . . shares in excess of 300,000 . . . been arranged. . . ." (Testimony of C. Leonard Gordon, CCI's Vice-President and General Counsel). It is true that Mr. Gordon testified that Burnham & Co. would have provided additional financing if more than 300,000 shares had been tendered. However, the record shows conclusively that CCI's chances of obtaining such a loan were negligible, due to a restrictive agreement in effect with its senior noteholders and the prohibitive cost of borrowing additional funds.

Under its agreement with its senior noteholders CCI had obligated itself not to have any unsecured current debt for bank loans in excess of a $15,000,000 revolving line of credit already obtained from the Philadelphia National Bank. The parties have stipulated that on February 3, 1969, the entire proceeds of this $15 million loan were re-

ceived by CCI and used by it to pay for Piper shares received by it on its January 24, 1969, cash tender offer, which closed on the same date the loan proceeds were received. (App. 825A). By February 4, 1969, CCI had purchased 540,000 shares of Piper stock at a cost in excess of $30,000,000. Its cash resources were virtually exhausted. Yet it did not seek waivers from its senior noteholders to permit additional borrowing. Indeed, the parties have further stipulated that no resolution authorizing CCI to borrow money or obtain credit from any other source to purchase Piper stock was ever sought or adopted. (App. 284A).

The reason for CCI's failure to seek additional loans was made clear by testimony of Mr. Woudhuysen, a partner of Burnham & Co., that the borrowing terms would have involved an 8¾% interest rate plus the issuance of 22,500 CCI warrants, exercisable at the market price of CCI common stock, for each million dollars borrowed on a two-year loan. Thus if CCI should borrow $20 million on such a two-year loan the total cost of the money, calculated according to a commonly accepted formula, would have been a staggering 43.11%!

In summary, having "shot its bolt" in the financial sense by early February 1969 CCI was thereafter relegated in its quest for control of Piper to the use of exchange offers. It was in no position to purchase for cash any appreciable amount of Piper shares over and above the 304,606 tendered in response to its initial cash offer. Indeed, although additional Piper shares were available in the market after the expiration date of CCI's tender offer, some at less than $65 per share,[3] CCI purchased only 9,100 shares between

3 The Piper family January letters and press release regarding the Grumman transaction did not cause an increase in the market price of Piper shares. On the contrary the price declined from 64¼ per share on January 28 to 59⅝ on February 3.

February 3, 1969, and April 7, 1969, when the SEC advised it that such cash purchases during the pendency of its exchange offer (for which it had filed its Form S-1 with the Commission on February 27, 1969, to become effective May 15, 1969) would violate Rule 10b-6. The record further reveals that although Herbert Siegel, Chairman of the Board of CCI, knew as early as February, 1969, that Cornfeld's Fund of Funds Proprietary Fund, Inc. owned a large block of 78,600 Piper shares (later purchased by BPC), CCI made no effort to purchase it. Nor can CCI's lack of pursuit of the substantial Cornfeld block be attributed to a hypothesized desire to avoid the expense of searching out and purchasing small blocks of shares, as the main opinion suggests.

By March 19, 1969, when the Grumman deal collapsed, any possible effect of the Piper family's January 29, 1969, Grumman press release was completely dissipated, and by April 7, 1969, when the SEC took the position that further cash purchases were prohibited by Rule 10b-6, CCI could no longer claim that the January letters inhibited its purchase of Piper shares. By May 8, 1969, when BPC announced its tender package valued at $80, CCI could no longer contend that the Piper family's statement that Piper shares were worth more than $65 per share was misleading. Nor is the main opinion's fanciful assumption that the January letters "undoubtedly . . . influenced" Piper shareholders against accepting CCI's later *exchange* offer by casting a general pall of unfairness over CCI's reputation anything more than rank speculation.

Dogged by its inability to obtain financing that would have enabled it to purchase available Piper stock for cash in competition with BPC, CCI's efforts to obtain control by the cash offer route were doomed to failure. By the close of its second exchange offer on August 4, 1969, CCI owned 41% of Piper's outstanding shares as compared with

45% owned by BPC. Thereafter it was BPC's cash purchases in the open market of 100,614 shares, as compared with CCI's capacity to buy only 29,200 shares, that won control for BPC.

Thus there has been a complete failure to show that the Piper family's January letters and press release, which form the sole basis for the majority's decision holding liable the Piper family defendants, caused any damage to CCI. The record is clear that the Piper communications, unlike the misleading statements in BPC's exchange offer or BPC's cash purchases in violation of Rule 10b-6, did not deprive CCI of a fair opportunity to compete in the contest for control or enable BPC to win that contest.

In short, since the record shows that CCI did not suffer any damages as a result of the Piper family's communications, I would affirm the dismissal of CCI's claim against the members of that family.

1. Piper's shareholder letter and release of January 23, 1969.

(a) One of the attacks on these communications centers on the utterance by the Piper management of its view that the $65 Chris-Craft offer was inadequate. While the offer was some $13 above the current market price, it was considerably less than a Piper holder, biding his time, could have received at later stages of the contest.

Chris-Craft insists that the communications could not be read to refer to any inadequacy of the Chris-Craft offer other than in respect to price and—to establish Piper's bad faith and intention to mislead—it points out that

(1) Piper's own bankers had advised Piper that $65 per share was a fair price and

(2) the Grumman agreement contemplated a sale of Piper stock by Piper to Grumman at $65 per share.[6]

Any Piper shareholder with a telephone or a newspaper at hand could compare the current market for Piper shares with Chris-Craft's offer. Thus, if the Piper statement of the inadequacy of the offer were intended to refer to price only it would be more fatuous than misleading. The more rational view is that the statement referred and was or should be taken to refer to other factors—such as Piper's

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[6] We do not doubt that one of the reasons for the Grumman agreement was the effect its consummation would have on the number of shares outstanding and consequently on the number Chris-Craft would have to acquire to gain control. W. T. Piper, Jr. had no hesitancy in stating that the Grumman transaction "would give us additional shares" and that it "might make the . . . tender offer of Chris-Craft less attractive to our shareholders." A psychological effect may have been intended as well—to discourage Chris-Craft early in the game by facing it with the prospect of a heavier than anticipated commitment to the contest. As noted above, the shares were never issued.

management's views as to company prospects or as to the quality of Chris-Craft management, should Chris-Craft acquire control.

That Piper's management refrained in these releases from expressing fully its personal (and in all likelihood unflattering) opinions about Chris-Craft's management does not, in our opinion, fault the communications. And if the statements were intended to convey the impression that to resist Chris-Craft Piper's management would bend its efforts to procure a better alternative for Piper shareholders, the efforts were made and were, in terms of price to tendering shareholders, successful.

Chris-Craft makes the further assertion that it was itself, as a purchaser, misled by the announcement of the Grumman agreement. Chris-Craft claims that an indication that Grumman was willing to pay $65 (in the absence of disclosure of the "put"—see n. 2 supra) helped to justify its own decision to pay that much, indicated that Chris-Craft might have a willing buyer for its block, should it decide to unload, and led Chris-Craft to refrain from exercising its right to withdraw its offer if any material increase in outstanding Piper shares were proposed or made.

While the Court has no doubt that the Grumman agreement, the announcement and their timing were strategic moves, it cannot conclude that the agreement was a sham, or that the "put" provision was anything more than what Piper purports it to be—Grumman's "out" in the event that a Grumman-Piper merger did not materialize. These were all, under the circumstances, rational steps for the Piper and Grumman managements to take and the Court cannot hold that in taking its steps Piper had any special duty to warn Chris-Craft (by disclosing the "put" or otherwise) not to gather comfort from the agreement price of $65 and not to rely on Grumman as a possible dumping ground for its shares of Piper.

Chris-Craft admits that Piper described the "put" aspects of the Grumman agreement fully in its application to the New York Stock Exchange for listing of the additional shares. Chris-Craft's contention therefore that, despite its efforts to obtain a copy of the Grumman agreement, it did not learn of it until April, 1969 when two Chris-Craft representatives were elected to the Board is not worthy of belief and can evoke little more than the additional response that it could have been more sedulous than it was to protect its already heavy and growing investment in Piper.

But the fatal blow to Chris-Craft's credibility on this issue is its action after April, 1969 when it claims first to have discovered the "put" provisions of the Grumman agreement. Between April 1 and August 18, Chris-Craft acquired about 150,000 additional shares of Piper. On May 16 it added $10 to its exchange package to compete with Bangor Punta. Such behavior with knowledge of the facts is inconsistent with a claim that knowledge would have caused Chris-Craft to change its course. Plaintiff's reference to *SEC* v. *Great American Industries*, 407 F.2d 453 (2d Cir. 1968), *cert. denied*, 395 U.S. 920 (1969) (nondisclosure of finders' fees) is, under the circumstances, beside the mark.

(b) Chris-Craft has further criticized the communications for saying that Piper was in a growth industry and expected "to participate fully in this growth". The basis of its attack is in product problems faced by Piper in connection with a model then in development (Pocono) and one already on the market (Twin Comanche). These are discussed at greater length, *infra*. Here it is sufficient to point out that inherent in Chris-Craft's claim are the assumptions (1), that these problems would effectively prevent Piper from participating in the industry's growth—which it has not proved and (2), that this on-the-run re-

sponse of Piper's management to Chris-Craft's foray into the Piper stock is to be tested by the standards applicable to a registration statement—a view which this Court rejects.

Chris-Craft's contentions as to the January Piper communications and the Grumman agreement must be and are rejected as unfounded.

Certificate of Service

I hereby certify that three copies of the foregoing Brief for Petitioners were served by hand this 9th day of June on Arthur L. Liman, Esq., 345 Park Avenue, New York, New York 10022, counsel for Respondent. I further certify that all parties required to be served have been served.

Dated: June 9, 1976

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IN THE

Supreme Court of the United States

October Term, 1976

No. 75-353
No. 75-354
No. 75-355

HOWARD PIPER, THOMAS F. PIPER and WILLIAM T. PIPER, JR.,
Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,
Respondent.

THE FIRST BOSTON CORPORATION,
Petitioner,

v.

CHRIS-CRAFT INDUSTRIES, INC.,
Respondent.

BANGOR PUNTA CORPORATION, NICOLAS M. SALGO and DAVID W. WALLACE,
Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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IN THE

Supreme Court of the United States

October Term, 1976

No. 75-353
No. 75-354
No. 75-355

HOWARD PIPER, THOMAS F. PIPER and WILLIAM T. PIPER, JR.,

Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,

Respondent.

THE FIRST BOSTON CORPORATION,

Petitioner,

v.

CHRIS-CRAFT INDUSTRIES, INC.,

Respondent.

BANGOR PUNTA CORPORATION, NICOLAS M. SALGO and DAVID W. WALLACE,

Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT CHRIS-CRAFT INDUSTRIES, INC.

This brief is submitted by respondent Chris-Craft Industries, Inc. ("Chris-Craft") in answer to briefs by petitioners Bangor Punta Corporation ("Bangor") and two

of its officers; The First Boston Corporation ("First Boston"); and former insiders of the Piper Aircraft Corporation ("Piper").

Questions Presented

This litigation arises out of a contest between Bangor and Chris-Craft for control of Piper in 1969. At the end of the contest, Chris-Craft owned 42% of Piper's stock and Bangor held 51%. The Second Circuit, in a series of opinions, held that Bangor had acquired 14½% of its Piper stock, more than the margin of difference, by repeated violations of the securities laws. Those violations, not placed in issue by the certiorari petitions, deprived Chris-Craft of a fair opportunity to compete for control in a race in which it otherwise would have held a commanding lead. Moreover, the violations converted Chris-Craft's $60 million investment in Piper from an attractive plurality into a huge minority block that nobody would touch with a ten-foot pole.*

In view of petitioners' blatant violations in this extremely close race, the Second Circuit held in Chris-Craft's favor on three separate occasions over the past seven years, in opinions totaling nearly 200 pages. Virtually every member of the Second Circuit participated in some phase of the litigation. In *Chris-Craft I*, 426 F.2d 569 (C 1-31) (1970)

* App. 3023. Chris-Craft paid more than $44 million for its shares in 1969 (A 18) and has incurred almost $3 million a year in interest charges to carry the investment (EV 893). The Appendix in this Court is divided into sections A through F, and references herein preceded by an alphabetical letter are to that appendix, *e.g.*, (A 10). References to the printed appendix submitted to the Second Circuit in *CC II* and *III* are cited as "App.," *e.g.*, (App. 10), or, if the reference is to that appendix's Exhibit Volumes, as "EV," *e.g.*, (EV 25).

("*CC I*"), and *Chris-Craft II*, 480 F.2d 341 (A 1-124) (1973) ("*CC II*"), the court found the violations and the injury. In *Chris-Craft III*, 516 F.2d 192 (B 1-42) (1975) ("*CC III*"), it calculated the damages. The Second Circuit acted *en banc* in the first decision and denied *en banc* reconsideration of the other two. In 1973, this Court denied certiorari on all the liability issues. 414 U.S. 910.

The *Chris-Craft* opinions have been widely followed across the nation because they reflect sound and traditional legal principles. And the Solicitor General, after a four-month review of this protracted litigation at the invitation of this Court, concluded that this case had been correctly decided and that the quantum of damages was proper.*

Petitioners now rehash their claims as to liability—claims labeled "frivolous" by the Second Circuit (B 40, n.30). Petitioners also raise issues as to the damages, even though the Second Circuit fixed damages at the "minimum amount" permissible (B 25) and noted that about the same damages would result using the theory of petitioners' star witness (B 31-32, n.24).

In light of the foregoing, the following questions are raised:

As to liability:

(1) Does a defeated contestant for control who obeyed the securities laws and lost an extremely close race have standing to sue its rivals, who won by repeatedly defying laws which Congress enacted to assure fair contests and

* Brief for the United States as *Amicus Curiae* Opposing Certiorari (Feb. 1976).

which were intended to provide a private right of action for all parties?

(2) Did petitioners lack scienter when they committed constant violations of the securities laws in a protracted campaign against Chris-Craft, when they knew material facts which they concealed, and when Bangor purchased critical blocks for $9 million cash in defiance of warnings by the Securities and Exchange Commission ("SEC") and its own counsel?

(3) Has causation been established where petitioners' misstatements were material, where Bangor's illicit acquisitions of 14½% of Piper's stock spelled the difference between victory and defeat, and where Chris-Craft would have had a formidable lead in the absence of those unlawful acquisitions?

As to damages:

(1) Did the Second Circuit compute damages correctly by taking the difference between Chris-Craft's cost before petitioners' violations and the highest resale price after Bangor illegally seized control, particularly where the appellate court deliberately awarded the minimum possible damages?

(2) Was it appropriate to hold petitioners jointly and severally liable where their combined violations contributed to an indivisible injury to Chris-Craft?

(3) Should First Boston enjoy immunity as an investment banker under Section 11 of the 1933 Act, even though

First Boston was found liable under Section 14(e) of the Securities and Exchange Act of 1934, 15 U.S.C. §78n(e), which requires proof of a more egregious violation than under Section 11?

Statement of the Case

Petitioners seek a de novo trial. They rely on claims rejected below, seek to create the appearance of factual conflicts between the trial and appellate courts and distort the opinions below. Such tactics cannot prevail. This was not a case of contested facts. Most of the critical facts were stipulated. The disputes related only to legal theories.*

The undisputed facts are as follows:

The "Scorched Earth" Policy

In December 1968, Chris-Craft began purchasing Piper stock. On January 23, 1969,** after accumulating more than

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* Thus, in *CC II*, dealing with liability, virtually all of the facts were stipulated over a period of almost a year, a point noted by the district court (A 161, n.22) and Second Circuit (A 7, n.1). The Second Circuit reversed in *CC II* because the district court applied incorrect legal standards (A 37).

Similarly, in *CC III*, dealing with damages, each side presented experts who submitted written reports in advance of trial. The basic differences were in the legal theories used by each expert, as opposed to disputes as to facts. The district court (B 45-47) and Second Circuit (B 12-17, 24-25) also stressed this point. And the Second Circuit reversed because "the district court applied an improper legal standard to the facts in formulating the measure of damages" (B 17, n.12).

** All subsequent dates, unless otherwise indicated, are in 1969.

200,000 shares, Chris-Craft annouced a $65 cash tender offer for 300,000 or more shares. The tender offer was approximately $12 above Piper's price on the New York Stock Exchange ("NYSE"). Without even studying the offer, the Piper insiders immediately opposed Chris-Craft and enlisted the aid of First Boston (A 10; App. 227), which advised them throughout the ensuing contest. The insiders' opposition, unprecedented in its fury, was characterized by an avowed "scorched earth" policy (App. 1890).

Between January 25 and 28, the insiders sent public stockholders three urgent letters opposing the tender offer (App. 240, 241-42, 246). Stressing their fiduciary duty to Piper's shareholders, the insiders stated that the $65 offer was "inadequate." In making that claim, the insiders concealed the facts that First Boston had privately advised them that $65 was indeed "fair and equitable" and that they were trying to sell 300,000 shares to Grumman Aircraft Corp. ("Grumman") at the identical price (A 37-38). In finding these letters to be materially misleading in violation of Section 14(e), the Second Circuit declared:

> "The Piper family's culpability regarding these shareholder letters is clear. Corporate officers and directors in their relations with shareholders owe a high fiduciary duty of honesty and fair dealing. . . . The Piper family obviously disregarded this obligation when they sent out these shareholder letters knowing that they were materially misleading." (A 38)

These misleading statements were promptly followed by an outright falsehood. On January 29, the insiders issued a press release, mailed to the shareholders, claiming

that Grumman "has agreed to purchase" 300,000 Piper shares at $65 a share (A 12, 39)—an investment commitment of $20 million. The press release stimulated headlines in the *Wall Street Journal* and *New York Times*—"Grumman Plans to Buy from Piper Aircraft 300,000 Unissued Shares; Merger Possible," "Grumman Will Buy Piper Block" (App. 271).

The Grumman press release was a hoax. While acquiring 300,000 shares, Grumman had an absolute right to "put" those shares back to Piper at the purchase price plus interest, and Piper had to segregate the Grumman funds to protect the put (A 11-12). In short, Grumman was not committed to invest $20 million in Piper: instead, it was given a free option (A 39). That fact was deliberately concealed, and the Grumman deal was rescinded shortly after the close of Chris-Craft's tender offer.

Asked why Piper issued 300,000 shares before Grumman would make a firm commitment, Piper's president, petitioner W. T. Piper, Jr., admitted that it made the Chris-Craft tender offer "less attractive to our shareholders" (A 135, n.6). The district court and the Second Circuit stated that Chris-Craft's tender offer was "adversely affected" by this publicity about an alleged Grumman agreement that was never consummated (C 34; A 39-40, 61-62). Although Chris-Craft had offered a cash price 20% above market, it could attract only about 300,000 of the 900,000 shares owned by the public. In condemning the false Grumman press release, the Second Circuit stated:

> "But Piper's failure to describe the put in its press release, or in its subsequent letter to shareholders, constituted a material omission in violation of §14(e).

> . . . The Piper family recklessly disregarded its obligation to shareholders in failing to disclose with substantial accuracy a transaction which was likely to affect the attitude of Piper shareholders toward the CCI tender offer." (A 39-40)

Although First Boston participated in the Grumman negotiations (App. 258), it chose "to remain silent" about the press release on the ground that it had "a kind of professional privilege" not to speak out.*

After carefully reviewing all of the insiders' misleading statements in January, the Second Circuit concluded:

> "[T]hese misleading statements most likely had a continuing adverse effect on CCI's attempt to acquire Piper shares. When Piper shareholders were deciding whether or not to accept CCI's [subsequent] exchange offer, many undoubtedly remembered and were influenced by the Piper family's misleading January statements portraying CCI as a company that made inadequate and unfair offers." (A 62-63)

As the next step in the "scorched earth" policy, the insiders, in consultation with First Boston, agreed to issue almost 470,000 shares of stock—about 30% of Piper's authorized stock—to acquire two unsuccessful companies in fields unrelated to the airplane industry, U. S. Concrete Company of Florida, and SouthPly, Inc. (A 13; App. 52). The insiders did not seek stockholders' approval, as required by Piper's listing agreement with the NYSE (A 13; C 35). Accordingly, Piper's registrar, Bankers Trust Company, refused to register the new shares (App. 2093). But this did not faze the insiders. Piper took what the Second

* First Boston Trial Memorandum at 5-7 (March 4, 1971).

Circuit described as the "extremely unconventional" step of acting as its own transfer agent and registrar: it printed new certificates and delivered them to the sellers of the two businesses (A 13). As a result, the NYSE initiated delisting proceedings against Piper and suspended all trading. *Id.* The insiders finally rescinded the transactions (C 35).

Petitioners' "Gun-Jumping" Press Release

In late February, Chris-Craft began processing a registration statement for an exchange offer in order to obtain a majority of Piper's shares. Shortly thereafter, the Piper insiders turned to Bangor, recruited by First Boston, in a final attempt to defeat Chris-Craft (A 14-15). This time they succeeded, as the result of new violations of the securities laws by their partner and advisor.

On April 20, First Boston, Bangor, and the Piper insiders held a summit conference at the Yale Club that led to an agreement dated May 8 (App. 317, 318). Under the contract, the insiders exchanged their 500,000 shares (about 31% of Piper's outstanding shares) for a package of assorted Bangor paper. Bangor agreed to use its best efforts to acquire additional Piper shares to attain more than 50%. It promised to make an exchange offer to Piper's public shareholders for a package of unspecified securities (A 14-15; C 36). On May 8, Piper and Bangor announced in a press release that Bangor would offer a package of securities to Piper's public shareholders "to be valued in the judgment of the First Boston Corporation at not less than $80 per Piper share" (C 5).

The SEC promptly brought an action against Piper and Bangor in the United States District Court for the District of Columbia charging that the $80 press release violated the SEC's "gun-jumping" rule, Rule 135, because it placed a dollar value on an unspecified bundle of Bangor securities as to which no registration statement had been filed (C 6). Bangor and Piper immediately consented to an injunction against further violations of the securities laws during the control contest (C 6). In *CC I*, the Second Circuit *en banc* held that the May 8 press release violated the "gun-jumping" rule (C 11-15). Despite the SEC's injunction, Piper repeated the $80 estimate to the *Wall Street Journal* on July 17—just before Bangor's exchange offer became effective (App. 1611-13; EV 131-33). During this period, Chris-Craft's competing exchange offer to Piper stockholders (consisting of securities and cash)—which in conformity with SEC rules made no prediction of value—had to compete against the promised $80 Bangor package.

The Insiders' $13 Million Bonus

To guarantee the success of its exchange offer, Bangor gave the Piper insiders a personal incentive to use their influence with public shareholders. Bangor promised the insiders a bonus if they helped Bangor obtain more than 50% of Piper's stock (A 14-15). Bangor's chairman conceded that the purpose of the bonus was to assure the "absolute cooperation" of the insiders (App. 2156). The insiders stood to reap a windfall of $13 million by July 18, the effective date of Bangor's exchange offer, if they could induce enough shareholders to accept Bangor's, rather than Chris-Craft's, exchange offer (A 40-41). Accordingly, the

insiders issued letters, telegrams and press releases in June and July urging the public to side with Bangor (A 40-41). These communications did not mention the $13 million bonus (A 40-41). Finding that this was a material omission contrary to Section 14(e), the Second Circuit stated:

> "Under these circumstances, the Piper shareholders were entitled to receive information sufficient to make an informed judgment on the weight to be given the personal recommendations of the Piper family." (A 41)

Bangor's Illegal $9 Million Cash Purchases of the Key Blocks from Cornfeld and Others

Both sides recognized that the close contest might well hinge on approximately 120,000 Piper shares (approximately 7½% of the outstanding shares) held by three funds, the largest controlled by Bernard Cornfeld. But SEC Rule 10b-6 prohibited either side from making cash purchases of those swing blocks during its outstanding exchange offer (C 15-18).

The SEC staff, recognizing the significance of these blocks, summoned Chris-Craft to a meeting on April 7. It warned Chris-Craft that Rule 10b-6 prohibited a tender offeror from purchasing Piper stock during its exchange offer (App. 1212-14). The SEC advised Chris-Craft that the same ground rules would apply to the other participants (App. 1213-14). Chris-Craft complied with the SEC's warning and thereafter refrained from buying any Piper stock for cash during its exchange offer (A 13).

Bangor showed no such restraint. At the April 20 summit meeting at the Yale Club, the Pipers, First Boston and

Bangor discussed cash acquisitions of the large key blocks. A First Boston official made the following notes, referring principally to the Cornfeld block:

> "Oppenheimer
> Lipper } 156,000 (two blocks)
>
> • • •
>
> —if you could take block from under him [Chris-Craft], good chance to win." (App. 382-1)

And Piper's proxy solicitor "kept wringing his hands about some 150,000 shares" held by funds committed to Chris-Craft (App. 1826). Bangor's president, Wallace, also recognized that if these shares were tendered to Chris-Craft, it would virtually be assured of control (App. 1826-27). Accordingly, the initial drafts of the agreement between Bangor and the Piper insiders, negotiated by First Boston (App. 318, 323-24), obligated Bangor to use "its best efforts" to purchase those pivotal blocks for cash (App. 383-84; EV 177, 194-95, 217-18).

The importance of the blocks was underscored in Bangor's April 23 strategy memo, which assumed that Bangor would acquire majority control by purchasing those blocks for cash in addition to the stock to be acquired from small shareholders in exchange for Bangor's paper (EV 298; App. 1824-26). Bangor's president, Wallace, was willing to spend cash for Piper stock, but only if he was assured of gaining control (EV 300). On May 6, Wallace told Bangor's Executive Committee, "[T]he existing information indicates that about 104,000 shares of Piper Aircraft are being held by several funds on behalf of Chris-Craft Industries, Inc. He [Wallace] . . . did not know whether this stock could be acquired," because, Wallace testified, he understood that the shares were "emotionally committed to Chris-Craft" (EV 139; App. 1836).

On May 5, while petitioners were making plans to buy the crucial shares for cash, the SEC issued a public notice specifically pointing out that such cash acquisitions were forbidden. The SEC release, proposing Rule 10b-13 outlawing cash purchases of target stock during an exchange offer, stated that existing Rule 10b-6 also prohibited such purchases:

> "This provision [proposed Rule 10b-13] is, in effect, a codification of existing interpretations under Rule 10b-6, which among other things, prohibits a person making a distribution from bidding for or purchasing the security being distributed or any right to acquire that security. These interpretations have pointed out that the security to be acquired in the exchange offer is, in substance, either a right to acquire the security being distributed or is brought within the rule under paragraph (b) thereof; and Rule 10b-6 prohibits the purchase of such security during the distribution except through the exchange offer unless an exemption is available . . . ." SEC Release No. 34-8595 (C 15-16).

It is stipulated that Bangor and the Piper insiders learned of the SEC release shortly after its issuance (App. 381).

John Flick, Bangor's General Counsel and Senior Vice President, testified that while he, Bangor's securities specialist and Bangor's outside counsel disagreed with the SEC's interpretation of Rule 10b-6, they instructed management to take a conservative position:

> "[W]e all came to the same conclusion, that that had never been a proper use of 10b-6. However, we felt that under the circumstances we should take a con-

servative position and therefore what we instructed management, in effect, was, or in substance, that in view of that language that we should not involve ourselves in the solicitation of any shares, in other words, that we thought it proper to buy shares of stock but only if they were unsolicited and not over an exchange.

Q. Did you give that advice to any of the executives at Bangor Punta?

A. Yes. I am sure that Mr. Martin and I both told Mr. Wallace and Mr. Salgo, the chairman of the board." (App. 1645)

Mr. Flick also cautioned management about the prohibition in Rule 10b-6 against purchasing shares from a broker or dealer (App. 1696-97).

Despite the SEC's May 5 warning and Flick's advice, Bangor went ahead with the game plan and solicited the critical control blocks for $9 million cash—the only cash it spent until after its exchange offer, when control was assured. Thus, on May 14, Bangor solicited Cornfeld's 78,600 shares for $80 per share in the Bahamas; the next day, it purchased 20,000 shares from American Securities Corporation, a broker-dealer; and between May 16 and 23, Bangor purchased 21,600 Piper shares from Bay Securities Corporation, another broker-dealer (A 16; App. 387, 389, 393, 396). It did not disclose the purchases from American and Bay to its counsel until after the fact (App. 1645-46, 1697).

In summary, between May 14 and 23, shortly after the SEC's May 5 public warning, Bangor appropriated three blocks totaling 120,000 Piper shares—or approximately 7½% of Piper's outstanding stock—for more than $9 million in cash. Bangor acknowledged shortly thereafter that these cash purchases sealed Chris-Craft's fate:

"Because of the large holdings of Bangor Punta and the Piper family, Chris-Craft will not be able to control the management of Piper or combine Piper's business with that of Chris-Craft."*

The Second Circuit, *en banc*, condemned those cash acquisitions in *CC I*. It declared that they offended the "letter" and "spirit" of Rule 10b-6, unless Bangor could prove that they were not solicited and were not purchased from broker-dealers (C 15-18). The court remanded for a determination of that issue (C 18). At the trial in *CC II*, Bangor stipulated that its purchases from Bay and American were from broker-dealers and thus were not exempt under Rule 10b-6 (A 149). But it claimed that Cornfeld was not a broker-dealer and that its purchase of almost 80,000 shares from him was not solicited. The district court found against Bangor, stating about Bangor's trip to Cornfeld's establishment in the Bahamas:

"Absent any other cogent explanation for the visit the facts seem to point fairly at a solicitation of the purchase from Proprietary [Cornfeld's fund] as the reason for the visit." (A 149)

The Second Circuit in *CC II*, as in its *en banc* decision in *CC I*, castigated Bangor for making the $9 million cash purchases of the critical blocks in defiance of Rule 10b-6 (A 16). It added:

"Even arithmetically, it is apparent that the block purchases in violation of Rule 10b-6 were essential to

* Complaint in *Bangor Punta Corp.* v. *Chris-Craft Indus., Inc.*, 69 Civ. 2354 (S.D.N.Y.), June 2, 1969, ¶11D.

achieve control. BPC's attainment of a majority position has caused CCI to suffer a decline in the value of its Piper holdings." (A 67; *see also* A 96, 111)

Bangor's False Exchange Offer

In addition to the key 7½% cash blocks, Bangor acquired an additional 7% of Piper's stock (111,000 shares) by means of its exchange offer, which the district court and Second Circuit found was materially misleading. That 7% block also provided the margin of difference in the tight race. The SEC filed a new action against Bangor because of the fraudulent registration statement, which was tried with Chris-Craft's suit.

Bangor's exchange registration statement and prospectus, endorsed by First Boston, represented that The Bangor and Aroostock Railroad ("BAR"), a railroad subsidiary, had a "market price evaluation" of $18.4 million (EV 99). The district court stressed that this figure was represented to be fair market value, not historical or book cost (A 142; D 4-5). The $18.4 million figure was false. Bangor concealed that it had been trying to sell BAR for some time; that the only interested buyer offered $5 million; and that Bangor was then contemplating a sale at about that price—a sale it authorized on the second business day after it took control of Piper (A 44-46).

Bangor's board minutes describing the BAR affair, reprinted in the Second Circuit's opinion because they are so important (A 51-54), show that on April 1, Bangor's board appointed a blue-ribbon committee of railroad experts headed by Curtis M. Hutchins, a director of Bangor, a

member of its Executive Committee and past president of BAR, to study disposition of the unprofitable railroad (D 5).* After reviewing the options, the Hutchins committee reported its conclusions to the board on May 21. It recommended a sale of BAR to the Amoskeag Company, a railroad headed by F.C. Dumaine (A 53). Hutchins stated that Dumaine was "the only person whom he knew who might be interested" and that Dumaine "had indicated he might be willing to pay $5,000,000" (A 53). Bangor's Chairman asked if Dumaine would pay $7,000,000 (A 53-54). Hutchins replied that Dumaine would probably stand fast at $5 million (A 54). The board then authorized Hutchins to negotiate a deal, subject to board approval and a study of accounting and tax ramifications (A 54).

Hutchins then resumed negotiations with Dumaine and actually gave him an unsigned letter for a sale at $5 million dated May 27, 1969 (EV 1-2). On June 16, while Bangor's exchange offer was in registration, Dumaine wrote the following inter-office memo of his conversation with Hutchins that day:

> "Curtis Hutchins said we definitely have a deal—they are in registration—he hopes to be out of registration in ten days—of course, that is questionable. He was informed by his lawyers that a definite commitment should not be made within two months of registration. We agreed that in the meantime I should go over the railroad with whomever I want to see the overall condition of the property and to meet the staff so that I will be prepared to select a staff on consummation date, if and when we have a consummation date." (EV 3)

* The Committee also included Gordon Robertson, co-Chairman of Bangor's board, Chairman of its Executive Committee and past president of BAR, as well as two other directors of BAR. The district court described the committee as "a highly knowledgeable group on matters pertaining to the railroad and its problems" (D 5).

The district court concluded that Bangor's board had not made a firm decision to sell BAR for $5 million during the control contest (A 143), saying that "Dumaine and Hutchins who negotiated and desired the sale, believed what they wished to believe, that their personal agreement concluded all but the formalities" (D 11, n.9). The sale following Bangor's acquisition of control showed that they were right.

In any event, the district court found that the representation that BAR had a "fair market value" of $18.4 million was materially misleading (D 15):

> "[T]he circumstances do indicate a sufficiently serious consideration of the possibility of sale at a figure some $13 million below the then carrying value of the BAR stock on Bangor Punta's books so as to force the conclusion that *the Bangor Punta directors could not, at the time, have believed* that the $18.4 million figure (based on an appraisal of 1965 fair market value) any longer represented a responsible appraisal of market value of the BAR holding." (D 13) (emphasis added)
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> • • •
>
> "[T]he $18.4 million carrying figure of the BAR holding was obsolete to the point of being misleading." (D 14)

The district court stated that it was

> "aware of no principle of accounting or of fair disclosure which would justify a failure to up-date a constructed carrying figure which may have reflected approximate fair value in 1965 but which was almost four times the offer of a willing buyer (and the only willing buyer) in 1969—an offer which the Board, despite its efforts in good faith to find alternatives—was constrained ultimately to accept. Consistency of fair disclosure required exposure of circumstances which so clearly rendered obsolete an appraisal made four years earlier." (D 14)

The district court explained why nondisclosure of the $13 million loss was so material. Disclosure "would involve the loss ($4.32 per share) which would have far exceeded the company's net income for any of the five prior years" and would have wiped out 36.5% of Bangor's retained earnings and "12% of the shareholders' book equity" (D 15).

By any standards, this was a highly significant matter in the context of competing exchange offers in a close control race. The Second Circuit condemned the BAR misrepresentations, stating:

> "We believe that the officers of BPC greatly transgressed their allowable area of discretion in not disclosing the BAR negotiations and other circumstances reflecting the value of the BAR. The officials in charge of the exchange offer were well aware of the discussions with Amoskeag and the activities of the special BAR committee. They also were aware of all the other circumstances that indicated that the book value of the BAR was deceptive and unrealistic . . . . They showed reckless disregard for the import of their activities concerning the BAR. They knew that the book value of the BAR set forth in the registration statement was no longer realistic." (A 47-48)

Bangor now concedes that it has "of course, never contended that in 1969 its directors believed the market value of the BAR to be $18.4 million." Br. for Bangor at 58.

No one can seriously defend the BAR fraud in this Court. Its impact was dramatic, particularly because the public viewed the competing exchange offers as roughly equivalent. Chris-Craft received 112,000 shares under its exchange offer; Bangor received 111,600 (A 18). The $13 million BAR over-statement, with its devastating impact on earnings and net worth, could not have been more material to a Piper shareholder faced with choosing between the two exchange offers. The Second Circuit declared: "Since BPC eventually acquired only about 51% of the outstanding Piper shares, it is clear that the 7% acquired through its exchange offer was critical to its success" (A 60).

First Boston's Complicity

First Boston—acting as advisor to the Piper insiders, appraiser for the Piper shareholders, and strategist for Bangor—played a key role at every critical stage of the nine-month campaign. It was held liable as an aider and abettor under Section 14(e) in connection with the four-fold inflated BAR value. First Boston called no witnesses at trial and the facts of its conduct were substantially stipulated.

First Boston had read Bangor's minutes disclosing that, after a long search, Bangor was prepared to sell BAR for $5 to $7 million (A 51-54). First Boston thus *knew* that BAR was not worth $18.4 million as represented. Despite this knowledge, First Boston endorsed BAR's inflated value in Bangor's registration statement and prospectus on its exchange offer. First Boston also endorsed this figure as the impartial expert to assure the public that

Bangor's exchange package had an $80 value.* The Second Circuit regarded First Boston's behavior as highly culpable. It declared:

> "... First Boston's certification of the BPC registration statement carrying the BAR at $18.4 million amounted to an almost complete abdication of its responsibility to potential investors, to CCI, and to others who relied upon it to detect misrepresentations. We hold that First Boston possessed enough information reasonably to deduce that the BPC registration statement was materially inaccurate." (A 55)

A Summary of the Violations

Petitioners' resistance to Chris-Craft was marked by deliberate defiance of the securities laws from start to finish. The following is a recapitulation of petitioners' violations:

1. The insiders' January letters describing the Chris-Craft $65 cash tender offer as "inadequate," without disclosing First Boston's advice that it was fair.

2. The insiders' January press release claiming that Grumman had committed to invest $20 million in Piper, whereas in fact Grumman merely held a free option which it allowed to lapse—a deal which First Boston helped negotiate.

3. The May 8 press release announcing an $80 exchange offer contrary to the SEC's "gun-jumping" rule.

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* That independent and expert judgment was to be made in light of First Boston's own views as to the value of Bangor's assets (including BAR) and other factors (A 42).

4. Bangor's $9 million cash purchases of the key 7½% blocks in deliberate violation of Rule 10b-6 and the warnings of the SEC and its own counsel.

5. The insiders' June-July letters urging rejection of Chris-Craft's exchange offer, without disclosing the insiders' $13 million bonus.

6. Bangor's exchange offer, endorsed by First Boston, concealing the $13 million BAR loss.

At every juncture of the battle, petitioners committed flagrant violations—so flagrant that the SEC brought two actions and the NYSE initiated disciplinary proceedings. There has never been a control contest so close, where one side's misbehavior was so persistent, and where the victim's injury was so great. Chris-Craft has been left a cripple, with its $60 million investment destroyed and most of its resources in an illiquid position in Piper.

The Critical Effect of Petitioners' Violations

Petitioners' violations gave Bangor a 45%-41% advantage over Chris-Craft at the close of the competing exchange offers in August. That was a virtually unbeatable lead, according to both sides' experts at the trial in *CC III*.*

Bangor's 45%-41% lead was insurmountable because, with only a relatively few Piper shares outstanding, Bangor

* App. 2430-31, 2629-30, 2722, 2876, 3020; EV 831. Indeed, at that point Chris-Craft asked Bangor to extend its exchange offer several days so that it could exchange its Piper stock for Bangor securities without violating Section 16(b) of the Securities Exchange Act, 15 U.S.C. §78p(b) (App. 2180-81). Bangor refused.

could reach 50% by purchasing only one share for every two that Chris-Craft needed (App. 1241-42).* Thus, Bangor could pay double the price per share that Chris-Craft could. The "scorched earth policy" had worked. The contest was over. Bangor proceeded to buy the few additional shares necessary to reach 50%.

In the absence of Bangor's unlawful acquisitions of 14½% of Piper stock, the picture would have been reversed. Chris-Craft would have led by at least 41% to 31% at the end of the exchange offers in August.** Such a lead would have been virtually unbeatable according to experts for both sides in *CC III* (App. 2430-31, 2629-30, 2722, 2876, 3020; EV 831). Petitioners' expert called such a lead "formidable" (App. 2876). Respondent's expert reported that it would have given Chris-Craft a statistical 99-to-1 assurance of victory (EV 831). And the Second Circuit recognized in *CC III* that Chris-Craft's position in a fair race would normally have commanded a control premium (B 21, 25-27). But petitioners' violations deprived Chris-Craft of an opportunity for control and transformed its $60 million investment into an albatross. As the majority holder, Bangor had the power to merge Chris-Craft out of Piper at any time, presumably at the bottom of the market

* Chris-Craft stopped buying shares then because the outcome was irreversible (App. 3087).

** Chris-Craft undoubtedly would have enjoyed an even larger lead. That is so because on the competing exchange offers in July (on which Chris-Craft attracted slightly more shares than Bangor Punta), Chris-Craft would have obtained some, if not most, of the Piper shares tendered to Bangor if the bad news about BAR had been disclosed. Moreover, the insiders' false statements in January dissuaded public stockholders from tendering more shares to Chris-Craft (A 62-63).

when prices were depressed (A 69; App. 2521-22, 2584-85, 2590; *see* EV 31; App. 329-30).*

The experts in *CC III* agreed that no private purchaser would buy Chris-Craft's 42% minority block.** Chris-Craft's only conceivable escape, according to the experts and the Second Circuit (B 28-29), was a registered public offering of its 700,000 share block (B 28; EV 834-35, 1236, 1246). Indeed, some experts questioned whether a public sale was possible (App. 2578-82, 2633-34; EV 883-85, 923, 926). Petitioners' own experts would not allow their Wall Street firms to sponsor such an offering without a firm commitment from Bangor and Piper to cooperate (App. 2831-32, 2859-60, 2862-65). The Second Circuit noted, based on the undisputed trial record (B 29-30), that a public offering, if it were possible at all, could not have taken place before January 1970 at the earliest (on assumptions most favor-

* Bangor had every intention of going forward with such a merger. From May 8 on, Bangor repeatedly declared its intent to combine with Piper (App. 326, 329; EV 31, 1471). Indeed, Bangor's agreement with its principal lender obligated it to acquire 90% of Piper within one year (EV 1474-77). Only the injunction entered by the courts below have prevented Bangor from carrying out this announced merger before November 1979 (C 8; B 81).

** B 28; App. 3023, 2435-36, 2525, 2633-34; EV 1244-46. A private purchaser of Chris-Craft's 42% minority interest would be at Bangor's mercy with respect to management and policy decisions. Moreover, he would be under the constant cloud of a merger threat by Bangor at a date selected for its own advantage. At that time, he would be forced to accept a grab-bag of Bangor securities or engage in a protracted and uncertain statutory appraisal proceeding, unappealing alternatives according to the experts (App. 2601, 2522-24, 2587-88; EV 884-85, 923). On the disadvantages and pitfalls of appraisal, see generally, Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 Harv. L. Rev. 1189, 1201-02 (1964); Manning, *Shareholder's Appraisal Remedy*, 72 Yale L.J. 223, 233 (1962).

able to petitioners); and such an offering would have netted Chris-Craft only about $27 per share (B 29).*

In contrast to the $27 maximum resale value, Chris-Craft's shares had an average cost of $64 and would have commanded a substantial control premium in a fair race where it would have been leading (B 25-27). Indeed, Bangor paid $80 for the key blocks, and its president testified that it was a sound investment (B 26, 22, n.15). Nevertheless, the Second Circuit computed "minimum" compensatory damages as the difference between Chris-Craft's cost ($64) and its optimum resale price ($27). The Second Circuit stated that, because it was computing damages itself rather than remanding, it would ignore Chris-Craft's control premium, assume that a public sale was possible, and give "defendants the benefit of the doubt" (B 26). It described its award as "the minimum amount of damages that the district court could have awarded without committing reversible error" (B 25). And the court, verifying its award, noted that virtually the same damages would

* Petitioners offered no evidence to dispute the $27 figure or the January date given by respondent's expert, Sigmund Warshager of Bear, Stearns & Co., in his pre-trial written report and in his testimony on the first day of the damage trial. Instead, petitioners' principal expert, Gant, simply assumed that Chris-Craft could have made an "overnight" public offering on the day Bangor achieved control (September 5, 1969); and he estimated that Chris-Craft would have received between $41.60 and $43.50 per share on such an offering (B 30; EV 1236). Gant also testified that in the unlikely event Chris-Craft could have found a private buyer for its stock on September 5, a 25%-30% discount would have been required (B 31, n.24). The Second Circuit found that a private placement was unrealistic and that legal and other requirements would have made a public offering impossible until January 1970 at the earliest (B 28-30). In fact, a registered offering would not have been possible until May because Piper's financials were delayed and were not approved by Bangor until after April 24, 1970 (App. 2441, 3002; EV 1007). By May, the market had collapsed (App. 2455-56).

have resulted if it had used petitioners' expert evaluation theory which assumed a hypothetical private placement in September on the very day Bangor seized control (B 31-32, n.24).

Summary of Argument

Only the facts—nothing else—are unusual about this case. Bangor illegally acquired two 7% blocks of Piper. Without either block, Bangor would not have 50%. Without both blocks, Chris-Craft would have enjoyed a formidable 41% to 31% lead after the exchange offers. First Boston promoted Bangor's misleading exchange offer despite its actual knowledge that BAR's value was inflated fourfold. And the Piper insiders injured Chris-Craft by fraudulent letters and press releases. The violations are undisputed. The injury is clear. The damages are conservative.

Petitioners, however, argue that this Court's recent opinions in securities cases give them an escape route. But those decisions do not condone what happened here.

*Rondeau** stressed that the Williams Act does not "tip the balance" in control contests and emphasized that private actions are a vital supplement to the SEC's limited enforcement capabilities.

*Blue Chip,*** approving the Second Circuit's *Birnbaum*† rule, denied standing to a passive spectator, who risked no money, in order to discourage "vexatious" suits—hardly

* *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 58-59, 62 (1975).

** *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975).

† *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 467 (2d Cir.), *cert. denied*, 343 U.S. 956 (1972).

a germane precedent because Chris-Craft invested $60 million in buying 700,000 shares.

*Hochfelder** rejected negligence as a substitute for scienter under the antifraud provisions of Section 10(b), as the Second Circuit did here under Section 14(e). Petitioners were held liable because they violated the law with actual knowledge of incriminating information and with reckless disregard for the consequences of their conduct.

Finally, *TSC*** approved an objective standard of materiality, held that a plaintiff need not prove that a misrepresentation changed the result, and again stressed the importance of private enforcement of the securities laws. *CC II*, cited in *TSC*, applied the same principles.

In short, the Court's recent quartet of opinions make *Chris-Craft* an *a fortiori* case. They all approve legal standards, long accepted by the Second Circuit, that were applied here on an undisputed factual record. Moreover, in contrast to the dubious claims in those recent cases, here there is an overpowering case of repeated violations and massive injury to a $60 million investment in a contest unique because of its closeness.

Petitioners' efforts to discredit the Second Circuit's decisions are without merit:

(1) *Violations*: Each petitioner suggests that its violations were at most mere technicalities. But petitioners did not even present the issue of their violations in their certiorari petitions. Their untimely effort to rationalize their conduct in their briefs cannot eradicate the fact that Bangor flouted Rule 10b-6 in spite of warnings by the SEC and

* *Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. 1375 (1976).

** *TSC Industries, Inc.* v. *Northway, Inc.*, 96 S. Ct. 2126 (1976).

its own counsel, and that the Piper and BAR misrepresentations were adjudged material under a stricter standard than required by *TSC*. The Second Circuit found that petitioners' violations struck at the heart of the regulatory scheme, offending both the letter and spirit of Rule 10b-6 and Section 14(e).

(2) *Standing*: Petitioners basically stake their appeal on the claim that control contestants such as Chris-Craft lack standing to sue. They contend that, no matter what their rivals do, parties were left by Congress to fend for themselves. But the legislative history, which petitioners' briefs mutilate, shows that Congress and the SEC, the proponent of Section 14(e), opposed allowing tender contests to degenerate into "industrial warfare," sought to strike a balance between entrenched management and the offeror, and intended private actions by all parties as a means of policing conduct in such contests.

The principle of implied private actions by all parties to a contest was pioneered under the proxy regulations, which Congress sought to emulate in the Williams Act. The courts, commentators, and the SEC (whose interpretation as the principal draftsman of Section 14(e) is entitled to special weight) have all recognized that a private right of action by the contestants is in accord with congressional intent. Public policy also compels this result.

(3) *Scienter*: Petitioners claim that they cannot be held liable because they lacked an evil state of mind. But they acted with actual *knowledge* of the material facts they hid; and Bangor purchased stock for cash in deliberate disregard of Rule 10b-6, and the warnings of the SEC and its own counsel.

The legislative history and language of Section 14(e) clearly establish that Congress did not intend a requirement of specific intent to defraud. On the undisputed facts of this case, the Second Circuit held that petitioners' conduct met the standard of knowing falsehood or reckless disregard of the truth (A 35, Timbers, J.); that they acted with "recklessness that is equivalent to wilful fraud" (A 96, Gurfein, J.); and that they ignored "red flags" and "warning signals" (A 106, Mansfield, J.). Petitioners' conduct thus met all of the classic criteria of scienter, including the standard that is applied in criminal securities cases. On this record their protestations of a lack of scienter are, as the Second Circuit declared, "frivolous."

(4) *Causation*: Petitioners chafe at the application in this case of the *Mills-Ute** standard of causation recently approved by this Court in *TSC*. But here materiality was established by the strictest standards and causation was a matter of mathematics (the illegal 14½% made the difference). Petitioners are thus reduced to the speculation that *perhaps* they would have won if they had not violated the law. This Court has always rejected such cynical speculation by wrongdoers, who would seek to escape liability by resolving against their victims any uncertainties created by their own misconduct.

(5) *Damages*: Petitioners attack the Second Circuit's damage formula which measured the difference between pre-violation cost and post-violation value. That is the traditional standard. The Second Circuit gave petitioners the benefit of all doubts, including the assumption that Chris-Craft's minority block could have been registered and sold by January 1970. The court verified its computation by using the testimony of petitioners' expert as to the price

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* *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1971).

that Chris-Craft's block would have yielded on a hypothetical private sale on September 5—a finding that further refutes petitioners' argument that the January 1970 public offering valuation was somehow unfair. The Second Circuit's damages were carefully tailored to the injury that petitioners caused Chris-Craft, and represented, as the Second Circuit noted, the "minimum" compensatory damages required by the record. There is no justification for a further remand in this seven-year litigation: the quantum of damages under the Second Circuit's formula was fully litigated in the district court, and the facts on which the Second Circuit relied were established beyond dispute.

(6) *The Claimed Amnesty for Investment Bankers*: First Boston argues that Section 11 of the 1933 Act shields it from liability in control contests, no matter what it says or does. But First Boston was found guilty of violating not Section 11, but Section 14(e), which imposes a far heavier burden of proof on plaintiffs. First Boston was held liable not for negligence but because it had actual knowledge of damaging facts and opted "to remain silent."

(7) *Joint and Several Liability*: Petitioners challenge the Second Circuit's holding that they are jointly and severally liable. But that result is hornbook law, because petitioners' combined acts inflicted a single injury on Chris-Craft—namely, the transformation of its commanding plurality into a useless minority.

Acceptance of petitioners' arguments would emasculate the securities laws and reduce control contests to a form of industrial warfare, contrary to Congress' intent in passing Section 14(e). It would place a premium on violating the law by allowing wrongdoers to keep their booty, while

denying their victims any compensation.* The Second Circuit's opinions, preventing that result, are correct. They effectuate Congress' intent. They work in the courts, with the *Chris-Craft* trilogy cited at least 50 times and no SEC intervention in control contests since *Chris-Craft*, because parties are now more law-abiding. They also work in the marketplace, with a dramatic increase in the number of control contests that were self-policing and did not require governmental interference. On all scores, the *Chris-Craft* opinions are sound. They should be affirmed.

ARGUMENT

I

PETITIONERS VIOLATED THE SECURITIES LAWS.

Petitioners' violations of the securities laws—found six years ago in *CC I* (*en banc*) and again in *CC II*—were not placed in issue by the certiorari petitions. Indeed, Bangor's petition specifically declares that it does not seek review as to the violations. Pet. for Bangor for Certiorari at 13-14. Nevertheless, now Bangor and the other petitioners suggest that they did not violate the spirit of the law. Such claims, not properly before the Court,** are without substance.

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* Indeed, here Bangor not only has retained its illegal majority position in Piper but claimed that its violations excused it from paying the Piper family its $13 million bonus (EV 1064).

** *Neely* v. *Eby Const. Co.*, 386 U.S. 317, 330 (1967); *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 428 (1964); *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 U.S. 93, 96 n.1 (1958); *Irvine* v. *California*, 347 U.S. 128, 129-30 (1954) ("We disapprove the practice of smuggling additional questions into a case after we grant certiorari"); Sup. Ct. R. 40(1)(d)(2). Petitioners' pro forma footnotes in their reply briefs on certiorari disclaiming their concessions are not sufficient to make the violations an issue.

Rule 10b-6

Bangor asserts that its $9 million cash purchases of the critical 7½% blocks from Cornfeld *et al.* were only "technical" violations of Rule 10b-6 and did not offend the rule's policy goals; that, moreover, Bangor was an " 'innocent party' that 'did not then know of any rule or interpretation precluding the transactions' . . . and was advised by its lawyers that the purchases were lawful." Br. for Bangor at 51-52; *see also id.* at 17, 19, 24, 33-36, 54. Those are false claims.

To support the proposition that it did not know of the SEC's interpretation, Bangor quotes from a dissent in *CC I* in 1969. Br. for Bangor at 51. That is disingenuous. That statement was made on the preliminary injunction motion when Bangor's knowledge was not an issue. Thereafter, at the trial in *CC II*, Bangor stipulated that it knew of the SEC's May 5 release warning against cash purchases (App. 381).

Bangor's claimed reliance on counsel is equally false. Its counsel admitted at the trial in *CC II* that he cautioned top management against soliciting cash purchases. *See supra* at 13-14. The district court found that the large Cornfeld block was solicited in a special flight to the Bahamas (A 149), a finding Bangor never appealed. In addition, Bangor stipulated that it bought the other two large cash blocks from broker-dealers, a violation of Rule 10b-6 (A 149), without the participation of counsel and despite the fact that counsel had called to management's attention the specific provisions of the rule barring purchases from brokers (App. 1645-46, 1696-97). That deflates Bangor's pretense of innocence.

The SEC, of course, can pass prophylactic rules such as 10b-6 to brand particular practices *per se* violations,* and its construction of its rules is virtually conclusive.** Here, the SEC broadcast a clear warning in the midst of the battle. Bangor just chose not to obey.

Bangor also argues that its violation could not have had a market impact because its purchases were publicized. Br. for Bangor at 6. Curiously, it seeks support for this proposition in the district court's opinion which said that the purchases were innocent because they were kept secret (A 152). Bangor's arguments about market impact were fully aired before and firmly rejected by the Second Circuit sitting *en banc* in *CC I*. The court there pointed out that publicity aggravated the evils of Bangor's cash purchases when competing exchange offers were pending (C 17). Bangor specifically disclaimed any intention of seeking review of these conclusions in this Court. Pet. for Bangor for Certiorari at 13-14. Bangor's repetition of these sham arguments is an afterthought which cannot obscure the fact that it simply defied the SEC to clinch control.

If Bangor had really believed, as it now claims, Br. for Bangor at 53, that its $9 million cash purchases would

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* *Jaffee & Co.* v. *SEC*, 446 F.2d 387, 391 (2d Cir. 1971) (10b-6 has "prophylactic" intent and thus "[w]here the rule applies, its prohibition is absolute"); *SEC* v. *D'Onofrio*, [1975-76 Transfer Binder] CCH Fed. Sec. L. Rep. ¶95,201, at 98,018 (S.D.N.Y. 1975) ("Rule 10b-6 defines as manipulative *per se* certain conduct"); Comment, *The SEC's Rule 10b-6*, 1967 Duke L.J. 809, 817 & n.36 (Rule 10b-6's prohibitions are "absolute"). Indeed, in its certiorari petition in *CC II*, Bangor conceded "intent was irrelevant" under Rule 10b-6. Pet. for Bangor for Certiorari at 11 n. (1973).

** *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 725 (1975); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965).

not have had a prohibited market impact, it could have resolved that matter honestly, because Rule 10b-6 provides:

> "(e) This rule shall not prohibit any transaction or transactions if the Commission, upon written request or upon its own motion, exempts such transaction or transactions, either unconditionally or on specified terms and conditions, as not constituting a manipulative or deceptive device or contrivance comprehended within the purpose of this Rule."

An application for an exemption would have been a prudent step for a law-abiding businessman to take before spending $9 million. But Bangor chose to take the law into its own hands. It secretly flew to Cornfeld in the Bahamas. Chris-Craft stayed home and obeyed the law.

The Second Circuit correctly ruled *en banc* six years ago that Bangor trampled on both the "letter" and "spirit" of Rule 10b-6 (C 18).

Section 14(e)

Bangor and the other petitioners also suggest that their misstatements and omissions did not offend the spirit of Section 14(e) because they were not "material." That argument, laid to rest four years ago in *CC II*, is fully answered by this Court's recent opinion in *TSC*. The Court, citing *CC II* as applying a similar test, stated:

> "[A]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote . . . . It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberation of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." 96 S. Ct. at 2133 (footnote omitted).

The Second Circuit in *CC II* applied even a stricter test than *TSC* in determining materiality. It asked whether a reasonable stockholder "would" have considered misstatements important, not just whether there was "a substantial likelihood."*

As the lower courts found, there is more than "a substantial likelihood" that a reasonable shareholder would have considered it important, in deciding how to select between the competing Bangor and Chris-Craft packages, to know about the $13 million BAR loss. If disclosed, that loss would have wiped out 36% of Bangor's retained earnings and 12% of its stockholders' equity and converted its positive earnings-per-share into a red-ink figure (A 46; D 15). This news would have been particularly critical because the competing exchange offers were regarded by Piper shareholders as approximately equal in value. *See supra* at 20. The truth about BAR would have been devastating.

There is also no merit to the Piper insiders' suggestion that the omissions in their January letters and press re-

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* "Whether 'a reasonable man *would* attach importance [to the fact misrepresented] in determining his choice of action in the transaction in question' . . . . Account must be taken of all the surrounding circumstances to determine whether the fact under consideration is of such significance that a reasonable investor *would* weigh it in his decision whether or not to invest." (A 35) (emphasis added). *See also* A 38, 45-46.

leases were not material. Br. for Piper at 27-29. Calling an option a $20 million "commitment" and calling a $65 tender offer "inadequate" despite First Boston's advice that it was "fair" would surely change the total mix of information for a Piper stockholder who had to decide whether to accept a cash tender above market or follow management's advice. In fact, Piper's president conceded materiality by admitting that the Grumman maneuver was designed to discourage stockholders from accepting Chris-Craft's offer (A 135 n.6, 136, 61-62).

In short, petitioners' repeated violations are beyond any dispute.

II

CHRIS-CRAFT HAS STANDING.

Petitioners' central argument is that Chris-Craft lacks standing to complain although it was the victim of the violations. That contention, based on legislative history quoted out of context, rests on the erroneous premise that Section 14(e) was passed to protect *only* stockholders of the target company and that therefore rival contestants cannot sue. That contention, contradicted by petitioners' acknowledgment that management can sue, was correctly rejected below. The Second Circuit, like other courts and commentators, recognized that all participants in control contests have standing, in view of the language and legislative history of Section 14(e), the availability of implied actions for rivals in the analogous situation of proxy contests, and the established policy of encouraging private enforcement of the securities laws (A 24-33, 95, 102-103; B 40, n.30).

The full legislative history of Section 14(e) of the Williams Act, rather than petitioners' selective quotations, shows unmistakable congressional intent to afford standing to all participants in a control contest:

(1) While Congress was concerned about protecting shareholders, it also intended to place the rival contestants on an even footing and not "tip the balance" in favor of entrenched management.

(2) Congress intended that tender contests and proxy fights should be subject to the same ground rules and methods of enforcement—and in proxy battles, both sides have the right to police each other by private actions.

(3) During the hearings on the Williams bill, witnesses specifically called attention to *Borak** and other cases which recognized private damage actions as a necessary supplement to the SEC's limited enforcement capabilities.

(4) By 1970, when Congress strengthened Section 14(e), there had already been repeated recognition in cases and commentaries that all rivals in tender contests had standing under Section 14(e).

(5) Finally, the SEC, as Section 14(e)'s principal draftsman,** has always emphasized that all participants in control contests have standing—a contemporaneous and consistent interpretation entitled to great weight.

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* *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964).

** *See* SEC Mem. on S. 2731 (89th Cong.), 112 Cong. Rec. 19,005 (Aug. 11, 1966).

Congressional desire to offer shareholders the option to tender at premium prices would be frustrated if the contestants lacked standing. No rational businessman would make a multi-million dollar offer, as here, if he were impotent to protect himself against foul tactics by his opponents. Protecting target stockholders and affording standing to contestants are thus harmonious objectives: indeed, the former depends upon the latter.

The Policy of Even-Handedness

The early legislative history refutes petitioners' argument that Section 14(e) was passed solely to protect shareholders. The policy of even-handedness among the rivals was a basic tenet of the new law from the outset. Thus, then-SEC Chairman Cohen, referring to recent Canadian tender offer legislation, wrote in 1966:

> "... The guiding principle of the drafters of this legislation [the Canadian tender law] was set out in ... the Kimber Report. It states: 'Shareholders should have made available to them, as a matter of law, sufficient up-to-date relevant information to permit them to come to a reasoned decision as to the desirability of accepting a bid for their shares.' This, however, must be balanced against the need to insure that new regulations do 'not unduly impede potential bidders or put them in a commercially disadvantageous position vis-a-vis an entrenched and possibly hostile board of directors of an offeree company.'
>
> "In considering the provisions of the pending bills to regulate tender offers, we agreed with the Kimber Report that this balancing of interests is appropriate."*

* Manuel F. Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock*, 22 Bus. Lawyer 149, 152 (1966).

The dual policy of protecting shareholders and rival contestants permeated congressional consideration of the Williams Act. *See* 113 Cong. Rec. 854-55 (Jan. 18, 1967), 24,664 (Aug. 30, 1967) (Sen. Williams); *Senate Hearings** at 3 (Sen. Williams); *id.* at 16, 34, 178, 205 (Cohen). The House and Senate Reports on the Williams Act both state:

> "The bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. It is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case." S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968).

This Court recently stressed this policy of even-handedness in *Rondeau*:

> "The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts. Indeed, the Act's draftsmen commented upon the 'extreme care' which was taken to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. S. Rep. No. 550, 90th Cong., 1st Sess., 3 (1967); H.R. Rep. No. 1711, 90th Cong, 2d Sess., 4 (1968). *See also Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 947 (CA 2 1969)." 422 U.S. at 58-59.**

* *Hearings on S. 510 before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. (1967) (*"Senate Hearings"*).

***See also GAF Corp.* v. *Milstein*, 453 F.2d 709, 717, n.16, 718, n.19, 719-20 (2d Cir. 1971) (Kaufman, C.J.), *cert. denied*, 406 U.S. 910 (1972).

Congress was thus intent on establishing a code of fair conduct which would prevent abuses by management as well as tender offerors. Denial of standing to an offeror would tip the balance in favor of management and its allies, which could then violate the law without fear of reprisal and without incurring liability for the injury to the offeror.

Widespread Recognition of Private Actions Prior to the Williams Act

The precedents prior to the Williams Act, while recognizing implied actions, did not adequately cover tender contests. This was a gap that had to be filled by the Williams Act.

The courts had long upheld actions by buyers and sellers under Section 10(b) of the 1934 Act.* Moreover, in control contests waged by proxies, the courts had recognized implied actions under Section 14(a) for stockholders, management, and rival contestants.** By 1968, it was settled law that there was a private right of action

* *See Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 730 (1975); *and see, e.g., Kardon* v. *National Gypsum Co.,* 69 F. Supp. 512 (E.D. Pa. 1946).

** Stockholders: *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964); *General Time Corp.* v. *Talley Indus., Inc.,* 403 F.2d 159, 161 (2d Cir. 1968), *cert. denied,* 393 U.S. 1026 (1969). Management: *Studebaker Corp.* v. *Gittlin,* 360 F.2d 692 (2d Cir. 1966). *Accord, General Time Corp.* v. *Talley Indus., Inc., supra; Greater Iowa Corp.* v. *McLendon,* 378 F.2d 783, 794 (8th Cir. 1967). Rivals: *Union Pacific R.R.* v. *Chicago & North Western Ry.,* 226 F.Supp. 400 (N.D. Ill. 1964), cited with approval by this Court in *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375, 385 (1970), and by Judge Friendly in *Electronic Specialty Co.* v. *International Controls Corp.,* 409 F.2d 937, 946 (2d Cir. 1967).

in proxy contests. The courts recognized that the opportunity for informed decisions by public shareholders—the goal shared by both proxy and tender regulation—could be assured only if both the insurgents and incumbent management had a right to police each other's conduct.

In the mid-1960's, however, proxy contests were superseded by a new and more popular technique for acquiring control—tender offers. But there was a "no man's land" in the law, because Section 14(a)'s proxy provisions did not apply to tender offers and Section 10(b)'s "buyer-seller" requirement limited its applicability.* Congress passed the Williams Act to subject tender contests to the same rules as proxy contests.** As the Commission stated shortly after the passage of the Act:

> "We are of the view that this new legislation was clearly intended to provide the same scope of protection as the existing proxy rules of Section 14. Our position was made clear in the Senate and House hearings and, we submit, was adopted by the committees in their respective reports. In testifying about the proposed bill, Chairman Manuel F. Cohen of the Commission repeatedly analogized the tender offer situation to a proxy dispute, and urged that 'the need for protec-

* *See* discussion in *GAF Corp.* v. *Milstein,* 453 F.2d 709, 717 (2d Cir. 1971), *cert. denied,* 406 U.S. 910 (1972); *Crane Co.* v. *Westinghouse Air Brake Co.,* 419 F.2d 787, 797-98 (2d Cir. 1969), *cert. denied,* 400 U.S. 822 (1970); *Iroquois Indus., Inc.* v. *Syracuse China Corp.,* 417 F.2d 963 (2d Cir. 1969), *cert. denied,* 399 U.S. 909 (1970); *Electronic Specialty Co.* v. *International Controls Corp.,* 409 F.2d 937, 945-46 (2d Cir. 1969).

** *See* H.R. Rep. No. 1711, *supra,* at 3; S. Rep. No. 550, *supra,* at 3; 113 Cong. Rec. 854 (Jan. 18, 1967) (Sen. Williams); *Senate Hearings* at 16, 21 (Cohen). Senator Williams stated, "This legislation is patterned on the present law and regulations that govern proxy contests." 113 Cong. Rec. 24,665 (Aug. 30, 1967). *See also* Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock, supra,* 22 Bus. Lawyer at 153.

> tion may be greater in the case of a tender offer.' . . . We believe it would be anomalous to conclude that Congress did not intend the same scope of protection for all situations arising under Section 14, absent any expression to the contrary."*

Thus the proxy precedents implying a private right of action for all participants are of particular significance in interpreting Section 14(e).

Discussion of Private Actions During Hearings on Williams Act

While Congress is presumed to be aware of judicial precedents** such as *Borak* which recognized implied actions under Section 14(a), there is no need to rely on presumptions here because private actions were openly discussed at the hearings.

Professor Painter of the University of Missouri Law School told the Senate Committee that the language of Section 14(e) would be construed to permit private actions, *Senate Hearings* at 140, and urged that Section 14(e) be made the exclusive remedy "for investors and others" in tender contests. *Id.* at 141.

Professor Israels of Columbia Law School called specific attention to *Borak* and stated that it could be assumed that similar actions would be implied under Section 14(e).† *Id.* at 67.

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* Brief for SEC as *Amicus Curiae* at 8-9, *Electronic Specialty Co.* v. *International Controls Corp.*, 295 F. Supp. 1063 (S.D.N.Y.), *aff'd in part and rev'd in part*, 409 F.2d 937 (2d Cir. 1969).

** *See, e.g., Electronic Storage Battery Co.* v. *Shimadzu*, 307 U.S. 5, 14 (1939).

† Bangor errs when it states that *Borak* was not mentioned in the deliberations on the Williams Act. Br. for Bangor at 37 n. *See, e.g., Senate Hearings* at 67, 140.

Chairman Cohen, who had previously stressed the need to strike a balance between the tenderor and management, repeated before Congress: "I should indicate, however, that the shareholders are not the only persons concerned." He referred to the plight of takeover bidders faced by unfair tactics by entrenched management, *Senate Hearings* at 178, which could wield "powerful weapons . . . with impunity provided its activities fall short of fraud." *Id.* at 183. He emphasized that the SEC was ill-equipped to police the accelerating number of control contests because of its limited manpower and the time pressures involved.* He noted that "litigation alleging fraud by one side or the other in a contested tender offer occurs almost weekly."**

Chairman Cohen warned, however, that it was questionable whether existing law covered misleading announcements by management and stated that any doubt on this score in connection with tender contests would be put to

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* *Hearings on H.R. 14,475 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 1st Sess. at 19 (1968) (*"House Hearings"*). *See also* Cohen, *The Development of Rule 10b-5*, 23 Bus. Lawyer 593, 597 (1968), stressing that private rights of action were important if not indispensable to aid the SEC and to enforce the securities laws; *Borak*, 377 U.S. at 432.

** There were also discussions at the hearings about the battle for control between Crane Co. and American Standard, Inc. for Westinghouse Air Brake Co., and the then-pending litigation it fostered, *House Hearings* at 22-30, in which the tenderor was subsequently found to have standing. *See infra* at 46-47. The *Mills* v. *Sarjem*, 133 F. Supp. 753 (D.N.J. 1955), proxy-tender litigation was also noted. *Senate Hearings* at 143; *House Hearings* at 59.

rest by Section 14(e).* Shortly after Section 14(e)'s passage in July 1968, the SEC in amicus briefs in two major cases reaffirmed this view that the new Section 14(e) was intended to confer standing on both tender offerors and management. *See infra* at 48.

In addition, while the Williams bill was being debated there were contemporaneous articles stating that if Section 14(e) was passed, it would confer standing on management and rival bidders. This point was emphasized, for example, in a March 1968 symposium of securities law experts reported in The Business Lawyer in July 1968 and in a May 1968 article in the Harvard Journal of Legislation.** Similar articles appeared immediately after Section 14(e)'s passage.†

* *House Hearings* at 59. In a June 26, 1968 letter to the House Committee, Chairman Cohen expressed the SEC's view that "existing controls in this area are inadequate" because of Section 10(b)'s buyer-seller limitation, which courts had construed as allowing Section 10(b) actions for fraud in corporate announcements only when the corporation has "itself been trading in securities." *Id.*

** Kennedy, *Tender Moment*, 23 Bus. Lawyer 1091, 1114 (1968) ("If adopted, this Section would eliminate one of the obstacles to suits presently brought under Rule 10b-5 by permitting anyone, not only purchasers or sellers, to bring actions in the Federal Courts against anyone who commits fraud in connection with a tender offer or any solicitation for or against a tender offer."); Swanson, *S. 510 and the Regulation of Cash Tender Offers: Distinguishing St. George From the Dragon*, 5 Harv. J. Legis. 431, 444 (1968).

† Professor Mundheim of the University of Pennsylvania Law School, a witness at the hearings, noted that Section 14(e) provided "a basis for suits by offerors against target companies." Mundheim, *Tender Offers*, 2 Rev. of Securities Regulations 953, 956 (Feb. 3, 1969). And in April, 1970, the Vanderbilt Law Review, in another symposium on securities laws, stated that the statute gave "standing to non-tendering shareholders, target corporations, and the offeror." Note, *The Williams Amendments: An Evaluation of the Early Returns*, 23 Vand. L. Rev. 700, 710 (1970). *See also* Bromberg, *The*

(footnote continued on next page)

In short, during the deliberations on Section 14(e), the air was laden with the concept of private enforcement by the parties to tender contests. In contrast, as this Court noted in *Blue Chip*, a private action was implied under Section 10(b) in the absence of any affirmative expression of congressional intent.*

Broad Statutory Language of Section 14(e)

The language of the statute—the ultimate evidence of congressional intent**—reflects a conscious decision to equate tender and proxy contests and to eliminate Section 10(b)'s buyer-seller restriction as an obstacle to private actions in tender contests. Unlike Section 10(b), which prohibits fraud and manipulative acts "in connection with the purchase or sale of any security," Section 14(e) bans inadequate disclosure, fraud or manipulation

Securities Law of Tender Offers, 15 N.Y.L.F. 459, 554 (1969); Hamilton, *Some Reflections on Cash Tender Offer Legislation*, 15 N.Y.L.F. 269, 291-92 (1969); Krasik, *Tender Offers: The Target Company's Duty of Disclosure*, 25 Bus. Lawyer 455, 458 (1969). And *see* Note, *Cash Tender Offers*, 83 Harv. L. Rev. 377, 398-99 (1969):

> "Congress intended not only to protect investors, but also to assure that struggle for control between offeror and incumbents would proceed fairly . . . . Both target companies and offerors have an interest in confining their adversaries to fair conduct, lest they suffer defeat because of practices which they are legally or ethically barred from meeting in kind. Affording standing to the offeror would, moreover, serve the legislative purpose 'to avoid tipping the balance of regulatory burden in favor of management . . . .' Future courts should extend *Electronic Specialty's* liberal standing doctrine to the offeror in suit against the target [citing *Union Pacific, supra*]."

* 421 U.S. at 729. Indeed, the seminal *Kardon* case said that such an action should be implied under a remedial statute in the absence of a negative expression by Congress. 69 F. Supp. 512, 514 (E.D. Pa. 1946).

** *Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. 1375, 1383 (1976).

> "in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation."

This expansive language—passed after Section 10(b)'s "buyer-seller" restrictions had been called to Congress' attention*—shows that Congress intended to afford standing to all parties in control contests and not tip the balance.

Cases Recognizing Implied Action Immediately After Passage of Section 14(e)

Shortly after Section 14(e)'s enactment, the courts recognized that it gave tenderors and management private actions in tender battles just as in proxy fights. *Butler Aviation International, Inc.* v. *Comprehensive Designers, Inc.*, 425 F.2d 842, 843 n.1 (2d Cir. 1970); *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787, 798-99 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970); *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F.2d 963, 969 (2d Cir. 1969), *cert. denied*, 399 U.S. 909 (1970); *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 946 (2d Cir. 1969).

In *Crane*, a defeated tenderor in a close race, like Chris-Craft, was granted standing to claim damages against its

* Chairman Cohen informed Congress of standing limitations under Section 10(b). *See supra* at 44, n.†. *See also Fleischer & Mundheim, Corporate Acquisition by Tender Offer*, 115 U. Pa. L. Rev. 317, 361-62 (1967); Kennedy, *Tender Moment*, 23 Bus. Lawyer 1091, 1114 (1968) (from a March 1968 speech); Swanson, *S. 510 and the Regulation of Cash Tender Offers: Distinguishing St. George From the Dragon*, 5 Harv. J. Legis. 431, 444 (1968) ("[T]he offeror will find it difficult to seek redress for misstatements by private action under 10b-5 because the deception, if effective, would not have caused injury to the offeror in the purchase or sale of a security.").

rivals, which had won by unfair tactics. While standing in *Crane* was recognized under Rule 10b-5's "forced seller" theory rather than under Section 14(e), which was not effective at the date of the transactions involved, the Second Circuit (Lumbard, Kaufman, Smith, JJ.) pointed out that Section 14(e) "should serve to resolve any doubts about standing in the tender offer cases, even where the offeror is not, as is Crane, in the position of a forced seller." 419 F.2d at 798-99. And in *Iroquois,* the Second Circuit (Lumbard, Anderson, Wyatt, JJ.), while denying standing to a tenderor under Rule 10b-5, indicated that the tenderor would have had standing under Section 14(e) if it had been in effect at the time of the transaction involved. 417 F.2d at 969.*

In *Electronic Specialty* (Friendly, Feinberg, Moore, JJ.) and *Butler* (Friendly, Lumbard, Judd, JJ.), the Second Circuit upheld the standing of management of a target company and again indicated that a tenderor like Chris-Craft would have an implied action in order to avoid tipping the balance. Judge Friendly stated in *Electronic Specialty*:

> "In effect this [§14(e)] applies Rule 10b-5 both to the offeror and to the opposition—very likely, except perhaps for any bearing it may have on the issue of standing, only a codification of existing case law. See Jennings and Marsh, Securities Regulation: Cases and Materials 912 (2d ed. 1968)." 409 F.2d at 940-41.

The defendant in *Electronic Specialty,* challenging the standing of the target company, made the same claim as petitioners here that "the focus of the legislative interest was on the public shareholder." 409 F.2d at 945. But

* Bangor distorts *Iroquois* by stopping its quotation from that opinion just short of the sentence recognizing standing. Br. for Bangor at 49.

Judge Friendly, citing the *Union Pacific* case, which granted standing to a rival in a proxy control contest, stated:

> "In determining who has standing to enforce duties created by statute, a court's quest must be for what will best accomplish the purposes of the legislature. . . . Militating in favor of an affirmative answer [i.e., granting standing] is the very fact of the superior resources of the corporation, which can be vital in this context where remedial action must be speedy and forceful." 409 F.2d at 946.*

These four cases received widespread publicity in the *Wall Street Journal* and legal periodicals.**

SEC Construction of the Statute

As noted before, the Commission, the chief draftsman of Section 14(e), has consistently stated that the new statute was intended to permit both management and the tenderor to bring private actions—just as in proxy contests under Section 14(a). It said so in *amicus* briefs in *Electronic Specialty*,† *Iroquois*‡ and in this case.¶

* This point was also emphasized in *H. K. Porter Co.* v. *Nicholson File Co.*, 482 F.2d 421, 424 (1st Cir. 1973); *GAF Corp.* v. *Milstein*, 453 F.2d 709, 719 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972).

** The progress of these cases was reported in the *Wall Street Journal* from the filing of the complaints to the denial of certiorari. *See, e.g., Iroquois*: Sept. 25, 1968 at 8; June 23, 1970 at 6; *Crane*: April 10, 1968 at 14; April 18, 1968 at 7; May 7, 1968 at 14; June 3, 1968 at 30; June 4, 1968 at 8; June 5, 1968 at 7; June 7, 1968 at 8; June 25, 1968 at 10; Oct. 13, 1970 at 40; *Butler*: Nov. 24, 1968 at 14; *Electronic Specialty*: Sept. 12, 1968 at 31; Dec. 20, 1968 at 9.

† Brief for SEC as *Amicus Curiae* at 8-9, 12, United States District Court for the Southern District of New York (Dec. 1968).

‡ Brief for SEC as *Amicus Curiae* at 23-26, Court of Appeals for the Second Circuit (Feb. 1969).

¶ Brief for SEC as *Amicus Curiae* at 11-12, Court of Appeals for the Second Circuit (May 1972).

The courts show great deference to a contemporaneous and consistent construction of a statute by the agency charged with its enforcement. *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 717-19 (1975); *NLRB* v. *Boeing Co.*, 412 U.S. 67, 75 (1973); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965). And even greater weight is given to an agency's construction when, as here, the agency helped draft the legislation. *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969): "Its impact [the agency's construction] carries most weight when the administrators participated in drafting and directly made known their views to Congress in committee hearings."

1970 Amendment of Section 14(e)

In December 1970, after repeated statements by the courts, commentators and the Commission that all participants in tender contests have rights of action, Congress reconsidered the Williams Act. It did not reject these precedents on standing. Instead, it strengthened the Act.* Indeed, Senator Williams referred to the need to deter counter-maneuvers by management in tender offers.**

* *See* Pub. L. No. 91-567; 116 Cong. Rec. 29,252 (Aug. 18, 1970); H.R. Rep. 1655, 91st Cong., 2d Sess. 2, 4 (1970).

** Thus, in 1970, Senator Williams made the following comments, which appear to describe the facts of *Crane*: "The techniques currently being used in these offers have become increasingly sophisticated and they change rapidly. This is particularly true when a takeover is resisted by incumbent management. In some instances industrial warfare occurs. Claims and counterclaims, charges and countercharges are hurled back and forth. Efforts are made to influence the price of securities involved. By granting this additional rulemaking authority the Congress would allow the Commission to deal promptly and with flexibility with these problems." 116 Cong. Rec. 29,252 (Aug. 18, 1970).

Congressional reaffirmation of Section 14(e) against the foregoing background—the four recent and well-publicized Second Circuit decisions, the contemporaneous interpretation by the SEC and the commentators, and Congress' own knowledge of the bitter litigations—dramatically confirms the original congressional intent to grant tender offerors and management the power to police their own control contests. This Court has previously held that judicial or administrative interpretation of a statute, followed by congressional reenactment of it, "is deemed to have received congressional approval and has the effect of law." *Commissioner* v. *Noel Estate,* 380 U.S. 678, 682 (1965); *Electronic Storage Battery Co.* v. *Shimadzu,* 307 U.S. 5, 14 (1939).*

Precedents Recognizing an Implied Action for Tenderors and Management

In view of the foregoing legislative history, the courts have uniformly recognized standing for contestants and management, as well as stockholders, in control contests. The rationale of the Second Circuit's *Crane-Electronic Specialty-Iroquois-Butler* quartet has been widely followed, not only in *Chris-Craft,* but in cases in other circuits.

Thus, the First Circuit, citing *Chris-Craft* with approval, upheld the right of a defeated tenderor to sue for damages in *H. K. Porter Co.* v. *Nicholson File Co.,* 482 F.2d 421 (1st Cir. 1973). The court there (Coffin, McEntee and

* *See also Dragor Shipping Corp.* v. *Union Tank Car Co.,* 371 F.2d 722, 726 (9th Cir. 1967); *Sherman* v. *Hamilton,* 295 F.2d 516, 520 (1st Cir. 1961), *cert. denied,* 369 U.S. 820 (1962); *In re Wisconsin Co-Operative Milk Pool,* 119 F.2d 999, 1002 (7th Cir.), *cert. denied,* 314 U.S. 655 (1941).

Campbell, JJ.) rejected the very argument—now made by petitioners here—that only stockholders of the target may sue under Section 14(e):

> "From the statutory scheme and the legislative history, it seems clear that the overriding purpose of §14(e) is the protection of the investor. Yet affording for the offeror and the target's management a cause of action for damages would in many instances further that purpose. With an obvious economic stake in the outcome of the tender offer battle, they have the incentive to detect violations and vigorously pursue remedies. *See* Bromberg, Securities Law, *supra,* §6.3(1040) at 124. Nicholson concedes Porter's right to sue in equity; but the threat of a damages action no less than an equitable suit may stimulate compliance, to the benefit of the investor. The Supreme Court said in *Borak* that '[p]rivate enforcement of the proxy rules provides a necessary supplement to [Securities & Exchange] Commission action . . . [T]he possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements.' 377 U.S. at 432, 84 S.Ct. at 1560. This proposition is no less applicable to the tender offer situation. We see no reason why actions by the protagonists in the battle, as well as by the stockholders themselves, would not be effective enforcement weapons." 482 F.2d at 424.

In *Sargent* v. *Genesco, Inc.,* 492 F.2d 750, 769 (5th Cir. 1974), and *Smallwood* v. *Pearl Brewing Co.,* 489 F.2d 579, 596, n.20 (5th Cir.), *cert. denied,* 419 U.S. 873 (1974), the Fifth Circuit also specifically approved *Chris-Craft's* rationale on standing. Bangor selectively quotes two disjointed passages from *Sargent* in order to create the impression that the Fifth Circuit stated that Section 14(e)'s

concern was limited to shareholders. Br. for Bangor at 43-44. By use of ellipses, Bangor omits the following language from the opinion:

> "Although section 14(e) does not expressly provide for a private right of action, courts have uniformly implied one. *See* Smallwood v. Pearl Brewing Co., *supra*, 489 F.2d at 596, n. 20. In determining who has standing to sue under 14(e), the quest has been for what will best further the objective of the statute. Consequently, the right to bring suit has not been limited to tendering offerees only but has been extended to numerous other parties who claimed to be victims of 14(e) violations. *See* Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir. 1973) (tender offeror had standing to sue target company's management and competing offeror); Electronic Specialty Company v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969) (target company and target company's nontendering shareholders had standing to sue for injunctive relief); H.K. Porter, Inc. v. Nicholson File Co., 482 F.2d 421 (1st Cir. 1971) (tender offeror had standing to sue target company's management); *see also* Gulf and Western Industries, Inc. v. Great Atlantic and Pacific Tea Company, 476 F.2d 687 (2d Cir. 1973); *but see* Washburn v. Madison Square Garden Corp., 340 F.Supp. 504 (S.D.N.Y. 1972)." 492 F.2d at 769.*

Other courts have also upheld the standing of tenderors. *See, e.g., Alaska Interstate Co.* v. *McMillan,* 402 F. Supp. 532 (D. Del. 1975) (standing of a tenderor in a struggle between two public companies); *Dyer* v. *Eastern Trust &*

* The court in *Sargent* refused to give standing to shareholders of a class of stock not the subject of the offer—strangers to the transaction.

Banking Co., 336 F. Supp. 890 (D. Me. 1971) (Gignoux, J.) (shareholder of tender offeror).*

Moreover, precedents under Section 13(d) of the Williams Act also recognize standing for all parties, including management and offerors, in control contests. *See, e.g., Rondeau* v. *Mosinee Paper Co.,* 422 U.S. 49 (1975); *GAF Corp.* v. *Milstein,* 453 F.2d 709 (2d Cir. 1971), *cert. denied,* 406 U.S. 910 (1972); *Alaska Interstate Co.* v. *McMillan,* 402 F. Supp. 532 (D. Del. 1975); *Jewelcor, Inc.* v. *Pearlman,* 397 F. Supp. 221 (S.D.N.Y. 1975). In *GAF,* the Court noted that *Borak's* recognition of private suits to supplement the SEC's activities "is part of the ABC's of securities laws." 453 F.2d at 719. *See also id.* at 721.

Thus, the Williams Act has repeatedly been construed by courts and commentators** to provide a private action for all participants in control contests. The point is so

* Judge Gignoux stated, "Unlike Section 10(b), Section 14(e) contains no hint of a purchaser-seller requirement. The decided cases under Section 14(e) have granted standing to claim its protection to the corporation which is the target of the takeover bid . . . ; to nontendering shareholders . . . , and to the tender offeror itself . . . ." 336 F. Supp. at 914 (citations omitted).

** *See* Aranow & Einhorn, *Tender Offers for Corporate Control* 286-88 (1973); 1 Bromberg, *Securities Law, Fraud: SEC Rule 10b-5,* §§6.3(1000)-(1040) (1975); Jennings & Marsh, *Securities Regulation: Cases and Materials* 937 (3d ed. 1972); Binder, *The Securities Law of Contested Tender Offers,* 18 N.Y.L.F. 569, 627 (1973); Bromberg, *The Securities Law of Tender Offers,* 15 N.Y. L.F. 459, 554 (1969); Dugan & Fairfield, *Chris-Craft Corp.* v. *Piper Liability Aircraft Corp.: Liability in the Context of a Tender Offer,* 35 Ohio St. L.J. 412 (1974); Hamilton, *Some Reflections on Cash Tender Offer Legislation,* 15 N.Y.L.F. 269, 291-92 (1969); Kennedy, *Tender Moment,* 23 Bus. Lawyer 1091, 1114 (1968); Krasik, *Tender Offers: The Target Company's Duty of Disclosure,* 25 Bus. Lawyer

(footnote continued on next page)

well established that standing is not even raised in cases today. Against the foregoing background, it is not surprising that petitioners have been able to dredge up only *one* case which even questions the standing of a tenderor—a dictum statement which is distinguishable and, in any event, against the overwhelming weight of authority.*

455, 458 (1969); Mundheim, *Tender Offers*, 2 Rev. of Securities Regulation 953, 956 (1969); Young, *Judicial Enforcement of the Williams Amendments: The Need to Separate the Questions of Violations and Relief*, 27 Bus. Lawyer 391, 398-99 & n.30 (1972); *Current Problems Under the Securities Acts—The Expanding Uses of Rule 10b-5*, 10 B.C. Ind. & Com. L. Rev. 313, 332 (1969); *Takeover Bids: Proceedings of Meeting Held in Lloyd's Writing Room, London, on Tuesday, 20 July 1971*, 27 Bus. Lawyer 243, 250 (1971) (S. Butler speaking); Note, *Chris-Craft and Loss of Opportunity to Control: The Lost Opportunity*, 43 Fordham L. Rev. 820, 821 (1975) ("While doubt surrounded the standing of target corporations and competing tender offerors to sue another tender offeror under 10b-5, such plaintiffs clearly have standing under Section 14(e)."); Comment, *Remedies for Defrauded Tender Offerors Under Section 14(e) of the Securities Exchange Act of 1934*, 62 Geo. L.J. 1693, 1695-96 (1974); Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 Harv. L. Rev. 1250, 1260 (1973); Note, *Cash Tender Offers*, 83 Harv. L. Rev. 377, 398-99 (1969); Comment, *Tender Offers: The Liberalization of Standing Requirements Under Section 14(e)*, 7 U. San Fran. L. Rev. 561 (1973); Note, *The Williams Amendments: An Evaluation of the Early Returns*, 23 Vand. L. Rev. 700, 710, 713-17 (1970); 51 Texas L. Rev. 1444, 1447-48 (1973); 19 Vill. L. Rev. 671 (1974).

* *Klaus* v. *Hi-Shear Corp.*, 528 F.2d 225 (9th Cir. 1975), is distinguishable, as pointed out in the Solicitor General's brief in opposition to certiorari. Brief for the United States as *Amicus Curiae* Opposing Certiorari at 18, n.9. *Klaus* denied a preliminary injunction because of lack of a showing of irreparable injury. If plaintiff had no standing, the court would never have reached the issue on the injunction. Moreover, the defendant target-company in that case conceded that the offeror had standing and a right to seek damages, which made injunctive relief unnecessary. Brief for Hi-Shear Corp., Dkt. No. 75-1544, at 46; Brief for Hi-Shear Corp., Dkt. No. 75-2380, at 49. In any event, *Klaus* rests primarily on the panel's interpretation of *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975). But *Rondeau* supports Chris-Craft's standing: it stresses the importance of even-handedness in tender contests and of private enforcement of the securities laws.

Petitioners also misplace their reliance on *Cort*.* There, the Court, while finding no private right of action under the Federal Election Campaign Act, explicitly contrasted and approved the private right of action provided by *Borak* for proxy contests. Significantly, *Borak* wrote on a slate clear of legislative history, not one replete with the evidence of congressional intent present here. The considerations that led the Court to imply a private action in *Borak* on behalf of the corporation demand even more so that standing be afforded to the participants in analogous tender contests.

Petitioners' Other Arguments as to Standing

1. *Rule 10b-6*: In *CC I*, the Second Circuit *en banc* held that Chris-Craft could obtain relief under Rule 10b-6 because of Bangor's $9 million cash purchases of critical blocks from Cornfeld and others (C 18). Chris-Craft's standing under Rule 10b-6 was expressly reaffirmed by the district court and Second Circuit in *CC II* (A 65, 132). Bangor did not even claim on appeal in *CC II* that Section 10(b)'s purchaser-seller requirement immunized its illegal purchases. Nor did it raise that argument in its certiorari petition in *CC II*.

Now, however, Bangor asserts that Chris-Craft cannot sue because it was not a "buyer" under *Blue Chip* with respect to the 120,000 critical shares which Bangor illegally bought for cash. Br. for Bangor at 32. Of course, Chris-Craft did not buy those shares: it could not have done so without violating Rule 10b-6. It offends public policy to argue that Chris-Craft lacks standing because it

* *Cort* v. *Ash*, 422 U.S. 66 (1975).

obeyed the law, while its rival could buy the key blocks with impunity by violating the law.

Bangor's argument stands *Blue Chip* on its head. In *Blue Chip,* this Court held that a plaintiff who had invested no money in the marketplace could not sue on the speculative theory that he might have purchased stock if the issuer had not painted such a pessimistic picture of the company's prospects. This Court, concerned about "vexatious" suits by bystanders, held that Rule 10b-5 did not permit actions unless the plaintiffs were actual buyers or sellers of stock. Here, Chris-Craft was not a bystander but a buyer: it invested $60 million to buy 700,000 shares. Moreover, at the time of Bangor's illegal acquisitions, Chris-Craft had an outstanding exchange offer for more Piper shares. Having illicitly preempted key Piper shares, Bangor cannot equate Chris-Craft with a passive bystander.

Reliance on *Blue Chip,* in any event, is misplaced because here Section 14(e) provides an independent basis for standing. Section 14(e) prohibits any "manipulative acts" which take place "in connection with" control contests. Violations of Rule 10b-6, by definition, are "manipulative acts" and are therefore covered by Section 14(e).*

There is no basis for Bangor's *ipse dixit* claim that even though its purchases are illegal "manipulative acts" under Rule 10b-6, they cannot be illegal manipulative acts under Section 14(e). Br. for Bangor at 35. In passing

* The Solicitor General in his *amicus* brief on certiorari made the same point. Brief for the United States as *Amicus Curiae* Opposing Certiorari at 17.

Section 14(e), Congress meant to stop all unfair tactics and not leave loopholes for ingenious schemes.* While both Sections 10(b) and 14(e) ban manipulative acts, different sections of the securities laws often "overlap" and this "is neither unusual nor unfortunate." *SEC* v. *National Securities, Inc.,* 393 U.S. 453, 468 (1969).** Clearly conduct which the SEC has branded "manipulative" per se was well within the intent of Congress in adopting Section 14(e).

2. *Cash Tenders*: Petitioners' suggestion (Br. for Bangor at 37; Br. for First Boston at 26), that Section 14(e) applies only to cash offers and not to exchange offers was rejected by Congress. Thus, the final House and Senate Reports state that Section 14(e) applies to tender offers "whether for cash, securities or other considerations."† A proposed exemption from Section 14(e) for registered exchange offers was deleted at the urging of the Commission on the ground, *inter alia,* that the antifraud provisions of the 1933 Act "do not extend to solicitation by management or by third persons in opposition to the tender offer"—the very situation presented by this case. *Senate Hearings* at 18, 38, 41.

3. *Alleged Injury to Piper Shareholders*: Petitioners argue that recovery of damages against Bangor will penalize former Piper stockholders who accepted the Bangor ex-

* *See, e.g., Senate Hearings* at 18, 21-22, 182, 183.

** Congress was aware of the overlap between Section 14(e) and rules promulgated under Section 10(b), *e.g., Senate Hearings* at 110, 119, 140-46, 210; 114 Cong. Rec. 21,484 (July 15, 1968) (Rep. Moss), including, specifically, Rule 10b-6. *Senate Hearings* at 131.

† S. Rep. No. 550, 90th Cong., 1st Sess. 11 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 11 (1968).

change offer, contrary to the Williams Act's intent to protect shareholders. But those Piper public stockholders, assuming they still have their Bangor stock after seven years, constitute a minute percentage of Bangor's stockholders, and they had the right to sue for the false exchange offer.* In any event, more Piper stock was tendered to Chris-Craft than to Bangor on the competing exchange offers (A 18). Petitioners show no similar solicitude for the innocent Piper stockholders who tendered to Chris-Craft. Acceptance of petitioners' specious argument would give control contestants a field day. By simply offering stock in exchange for the shares of a target company, a tenderor would be insulated from liability, no matter how outrageous its tactics in the control contest.

4. *Alleged Distinction Between Damages and Injunction*: Petitioners acknowledge that a tenderor has standing to seek a preliminary injunction under Section 14(e), but not to seek damages. Br. for Bangor at 46-47; Br. for First Boston at 24; Br. for Piper at 38. There is no basis for that distinction in logic or in Section 14(e)'s legislative history. The identical argument was rejected in *Borak*, where this Court, in upholding standing for damages, declared: "Nor do we find merit in the contention that such remedies are limited to prospective relief." 377 U.S. at 434. This Court could not have been more firm in its mandate that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the con-

* Petitioners repeatedly hail the fact that no former Piper shareholder accepted Bangor's 1976 rescission offer. But the market price of Piper shares on the Philadelphia-Baltimore-Washington exchange had declined so much in the past seven years that rescission was a wholly illusory remedy.

gressional purpose." *Id.* at 433. *See also H. K. Porter Co.* v. *Nicholson File Co.*, 482 F.2d 421 (1st Cir. 1973), where the identical argument was made and rejected.

The argument that only injunctive relief is available is especially perverse here. When Chris-Craft originally sought a preliminary injunction, petitioners claimed that Chris-Craft had an adequate remedy in money damages.* After the preliminary injunction was denied, petitioners then claimed that money damages were also unavailable.

Bangor's exercise of control over Piper during the protracted litigation—its change of basic corporate policy and management—made equitable relief unfeasible (A 68). A court whose equitable jurisdiction has been properly invoked may, if prospective relief is impractical, award damages.** This principle, recognized in *Borak*, was more recently applied in *Mills*, where this Court directed that damages be awarded if a merger could not be unwound. 396 U.S. at 388-89. Petitioners' artificial distinction between prospective and retrospective relief is an attempt to create a loophole to avoid any relief.†

* Br. for Bangor at 40 (Sept. 18, 1969); Br. for Piper at 15 (Sept. 18, 1969).

** *See McDonald* v. *Oliver*, 525 F.2d 1217, 1226-27 (5th Cir. 1976); *Crane Co.* v. *American Standard, Inc.*, 490 F.2d 332, 341-42 (2d Cir. 1973); *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 946-48 (2d Cir. 1969).

† The cases cited by petitioners for the alleged distinction between equitable relief and damages are inapposite. Their main precedent, *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 260-61 (1972), turns on the fact that Section 4 of the Clayton Act limits treble damage actions to persons injured in their "business or property," whereas Section 16 gives "any person" standing to sue for an injunction. Congress made no such distinction in the securities statutes. The securities cases cited by Bangor, Br. for Bangor at 47 n., indicate that certain elements of proof may be relaxed when a plaintiff seeks prophylactic relief rather than damages and do not hold that standing depends on the relief sought.

Policy Considerations

Because of the overwhelming legislative, judicial and administrative history of the Williams Act, petitioners finally fall back on so-called policy considerations against standing. Basically, they speculate that private actions by insurgents will discourage tender offers which are beneficial to stockholders. The market has already refuted this claim. There have been a record number of tender offers since *Chris-Craft.** The goal of encouraging tenders for the benefit of shareholders would surely be frustrated if contestants lacked standing. No honest and prudent businessman would enter such a multi-million dollar venture, as Chris-Craft did here, if he thought that his adversaries could win by illicit tactics and escape liability under the guise of standing.

All of the policy considerations, discussed at the hearings on Section 14(e), compel standing. A major theme, as noted above, was to place the tender offeror and management on an equal footing—a particularly important policy, since management starts with great advantages and often with self-serving motives. Bangor and First Boston recognize that management has standing under Section 14(e). Br. for Bangor at 46; Br. for First Boston at 24. Denying standing to a rival would obviously "tip the balance," contrary to Congress' intent.

A contestant for control who seeks shareholders' votes by a proxy solicitation can sue management for unfair

* *Merger Summary,* published semi-annually and annually by W. T. Grimm & Co., financial consultants, Chicago, Ill.

practices. But, under petitioners' theory, one who buys the shareholders' stock would be powerless. Congress not only equated tender and proxy contests, but made certain not to discourage tenders for stock.

Moreover, acceptance of petitioners' one-sided view of standing would transform control contests into jungle warfare, because there would be no effective way to stop a management that was bent on using foul tactics. The SEC does not have the manpower to police such contests, as recognized in *Borak* and by the SEC in this case.* This case proves the point that action by the SEC is often too little and too late. For here, an SEC injunction against Bangor went unheeded, and the rescission offer it obtained took place six years after the event at a time when the market made it illusory.

To restrict private enforcement to shareholder class actions, as petitioners suggest, is even more undesirable. As this Court noted in *Blue Chip,* actions on behalf of small shareholders with virtually no interest in an enterprise offer dangerous opportunities of strike suits. Senator Williams also expressed pessimism about the effectiveness of

* The Solicitor General and the SEC—who best know the limits of the agency's resources—made precisely this point in their Brief as *Amicus Curiae* Opposing Certiorari at 15:

> "This prohibition against unfair opposition is best policed by tender offerors themselves, through private lawsuits. The individual shareholders who succumb to the fraud, either by rejecting the tender offer or by accepting that of a competitor, may not have sufficient resources or adequate incentive to contest the fraud. The target corporation and its management may, as here, be among the guilty parties. The Securities and Exchange Commission has limited resources and may not be able to monitor every corporate takeover bid."

actions by small stockholders as an enforcement tool.* The parties best suited to enforce Section 14(e) are the contestants who have vital economic stakes in the outcome.**

Enabling the principal contestants to police their own contests makes particularly apt today the observation of Roscoe Pound:

> "From the beginning, the main reliance of our common law system has been individual initiative. The main security for peace at common law is private prosecution of offenders . . . [T]he individual is supposed at common law to be able to look out for himself and to need no administrative protection." Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice,* 8 Baylor L. Rev. 1, 13 (1956).

Conclusion

The evidence of congressional intent, the language of the statute, the policy considerations and the consistent interpretations by the courts, the SEC and commentators all support the Second Circuit's conclusion that Chris-Craft has standing.

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* 113 Cong. Rec. 855 (Jan. 18, 1967); 111 Cong. Rec. 28,258 (Oct. 22, 1965).

** The First Circuit has noted,

> "[A]fforading for the offeror and the target's management a cause of action for damages would in many instances further [14(e)'s] purpose [of protection of the investor]. With an obvious economic stake in the outcome of the tender offer battle, they have the incentive to detect violators and vigorously pursue remedies." *H. K. Porter Co.* v. *Nicholson File Co.,* 482 F.2d 421, 424 (1st Cir. 1973). *See also GAF Corp.* v. *Milstein,* 453 F.2d 709, 719 (2d Cir. 1971), *cert. denied,* 406 U.S. 910 (1972).

III

DEFENDANTS ACTED WITH SCIENTER.

Despite their unrelenting violations, petitioners now claim that they acted without evil intent and therefore lacked scienter as defined in *Ernst & Ernst* v. *Hochfelder,* 96 S. Ct. 1375 (1976). That argument distorts *Hochfelder* and ignores the facts of this case. Petitioners were not found liable for neglecting to look at somebody's desk for unopened mail as in *Hochfelder.* Here, they opened the mail, read it, and quietly put it back in the drawer. Petitioners violated the law with actual knowledge of the incriminating facts—they *knew* that the solicited cash purchases were illegal and they *knew* material facts about BAR and Grumman which they hid. The undisputed facts, in contrast to petitioners' subjective characterizations, show scienter from start to finish:

January 27—Piper insiders tell public that Chris-Craft's $65 cash offer is "inadequate," although First Boston had just advised the opposite.

January 29—Insiders publish fraudulent Grumman releases, while First Boston, with awareness of the actual transaction, "remains silent."

April 7—Insiders provoke delisting proceedings by the U.S. Concrete-SouthPly fiasco, in which First Boston acted as Piper's advisor.

April 20—Bangor, at a meeting with First Boston and the Piper insiders, is urged to solicit Cornfeld's key block.

May 8—Petitioners issue $80 "gun-jumping" press release, reviewed by First Boston, resulting in consent injunction in first SEC action—an injunction soon to be violated.

May 14-18—Bangor pays $9 million cash for the critical 7½% blocks from Cornfeld, *et al.*, in defiance of the recent SEC published warning and its own counsel's advice.

June 4-July 25—Insiders implore the public to accept the Bangor rather than the Chris-Craft offer without disclosing $13 million bonus.

July 18—Bangor acquires another critical 7% of Piper by false exchange prospectus concealing $13 million BAR loss. First Boston, as dealer-manager and public appraiser, endorses Bangor package, although it knows of the four-fold BAR inflation from the corporate minutes. Again, it elects to "remain silent."

September 5—Bangor seizes control of Piper. On the second business day thereafter, September 9, it authorizes sale of BAR for $5 million to Dumaine.

Petitioners did not act impulsively in an overnight control contest. This was a nine-month struggle. Moreover, early in the race, there were warning signals, including an SEC action against Bangor and the Pipers, NYSE delisting proceedings, and warnings by the SEC staff. That should have made these sophisticated businessmen particularly sensitive. Instead, they kept on defying the law.

Based on the undisputed facts, the Second Circuit held that petitioners had acted with scienter. The court

stated that "specific intent to defraud was not indispensable" but emphatically rejected the negligence standard that petitioners contend was applied (A 54, n.24). The court declared that "knowledge of falsity or reckless disregard for the truth" was required (A 35).

The Second Circuit found that this standard had been fully satisfied. Judge Gurfein characterized petitioners' conduct as "'recklessness that is equivalent to willful fraud,'" quoting Judge Friendly's scienter definition in *Texas Gulf Sulphur** (A 96). Judge Mansfield, citing that opinion and Judge Adams' opinion in *Kohn*,** said that petitioners knew the facts and refused to heed "red flags" and "warning signals" (A 106). Judge Timbers considered petitioners' misconduct to be even more outrageous (A 84). And petitioners' scienter claims were dismissed as "frivolous" in *CC III* (Oakes, Mansfield and Timbers, JJ.) (B 40, n.30).

Despite the incriminating facts and the Second Circuit's unequivocal conclusions, petitioners contend that Section 14(e) requires more—proof that a person who commits a knowing violation of the securities laws had a mental state dominated by a specific intent to defraud the injured party. This is a standard which no court has ever required in a criminal or civil securities case—a standard which would make the right to a private remedy illusory. It would permit wrongdoers with actual knowledge of the truth to

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* *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 868 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

** *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255 (3d Cir.) (Adams, J., concurring and dissenting), *cert. denied*, 409 U.S. 874 (1972).

escape on the basis of the very type of self-serving statements of mental attitudes that the Court criticized in *Blue Chip* as the basis for an action by an innocent party. 422 U.S. at 743-46.

Hochfelder and Its Antecedents

For their argument that specific intent to defraud is required, petitioners rely on *Hochfelder*. There, this Court rejected negligence as equivalent to scienter for liability in a Rule 10b-5 case. The Court held that the anti-fraud language of Section 10(b) required "knowing or intentional misconduct." 96 S. Ct. at 1383. Under the language of Section 10(b), which "speaks so specifically in terms of manipulation and deception," 96 S. Ct. at 1391, and for the purpose of that case, the Court defined scienter as an "intent to deceive, manipulate or defraud." 96 S. Ct. at 1381. *Hochfelder* certainly does not immunize petitioners from liability in this case.

First, neither *Hochfelder* nor the precedents it cited hold that a knowing misrepresentation of an important fact (such as the BAR and Grumman misstatements) or a premeditated violation (such as the Cornfeld cash purchase) would not constitute sufficient scienter. Indeed, the word scienter means "knowingly." Black's Law Dictionary at 1512 (4th ed. 1968). And the precedents referred to in *Hochfelder* have all accepted knowledge of falsity or reckless disregard as sufficient for liability.

Thus, *Lanza* v. *Drexel & Co.*, 479 F.2d 1277, 1306, n.68 (2d Cir. 1973) (*en banc*), citing *CC II* with approval, makes clear that knowledge of falsity or deliberate disregard of the truth constitutes fraudulent intent or scienter. *Small-*

wood v. *Pearl Brewing Co.*, 489 F.2d 579, 606 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974), holds that scienter would be present if "defendants made statements they either knew to be false or knew they had no basis for believing were true." Judge Adams' chart of scienter cases in *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255, 312-16 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972), shows that knowledge of falsity or indifference to truth satisfies 10b-5's scienter standard. *Clegg* v. *Conk*, 507 F.2d 1351 (10th Cir. 1974), *cert. denied*, 422 U.S. 1007 (1975), condemns the making of statements with knowledge of falsity or disinterest in their accuracy. Judge Friendly's concurring opinion in *SEC* v. *Texas Gulf Sulpher Co.*, 401 F.2d 833, 868 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), states that scienter is satisfied by "recklessness that is equivalent to willful fraud," citing a case of a lawyer guilty of "closing his eyes to what he saw."* Judge Friendly's opinion in *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1299 (2d Cir. 1973), specifically approved *CC II's* scienter ruling, in the very sentence only partially quoted by Bangor. Br. for Bangor at 67 n. Finally, Bucklo, *Scienter and Rule 10b-5*, 67 Nw. U.L. Rev. 562, 568-70 (1972), also cited in *Hochfelder*, states that if a person knows the falsity of the statements, whatever his subjective intent, the conduct is fraudulent. In short, no court ever required more than a knowing violation, and that was surely proved here.

Second, in *Hochfelder*, the Court specifically left open the question "whether, in some circumstances, reckless be-

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* *SEC* v. *Frank*, 388 F.2d 486, 489 (2d Cir. 1968). Judge Adams stated that the *Frank* case strongly suggests that "recklessness would be tantamount to willful fraud, from which intent could be inferred." *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255, 281 (3d Cir.) (Adams, J., concurring and dissenting), *cert. denied*, 409 U.S. 874 (1972).

havior is sufficient for liability under §10(b) and Rule 10b-5." 96 S. Ct. at 1381, n.12. The precedents cited in *Hochfelder,* noted above, stated that recklessness was adequate. Indeed, reckless disregard of the truth is sufficient to meet the heavy burden of proof in criminal cases under the securities laws* and other penal statutes.** It is a standard jury charge that reckless disregard satisfies the high degree of intent necessary in criminal cases.† Reckless disregard of the truth also limits the press' rights under the First Amendment in libel suits by public figures.‡

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* *United States* v. *Natelli,* 527 F.2d 311, 322-23 (2d Cir. 1975), *cert. denied,* 44 U.S.L.W. 3592 (April 20, 1976); *United States* v. *Henderson,* 446 F.2d 960, 966 (8th Cir.), *cert. denied,* 404 U.S. 991 (1971); *United States* v. *Simon,* 425 F.2d 796, 812 (2d Cir. 1969), *cert. denied,* 397 U.S. 1006 (1970); *Elbel* v. *United States,* 364 F.2d 127, 134 (10th Cir. 1966), *cert. denied,* 385 U.S. 1014 (1967); Matthews, *Criminal Prosecutions Under the Federal Securities Laws and Related Statutes: The Nature and Development of SEC Criminal Cases,* 39 Geo. Wash. L. Rev. 901, 954 (1971).

** *See, e.g.,* mail fraud, 18 U.S.C. §1341: *United States* v. *Mackay,* 491 F.2d 616, 623 (10th Cir. 1973), *cert. denied,* 419 U.S. 1047 (1974); *Babson* v. *United States,* 330 F.2d 662, 664 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964); Civil Rights Statute, 18 U.S.C. §§241, 242: *United States* v. *Guest,* 383 U.S. 745, 786 (1966) (Brennan, J., concurring); making false statements to the government, 18 U.S.C. §1001: *United States* v. *Sarantos,* 455 F.2d 877, 880 (2d Cir. 1972); *United States* v. *Abrams,* 427 F.2d 86, 91 (2d Cir.), *cert. denied,* 400 U.S. 832 (1970); other penal statutes: *United States* v. *Thomas,* 484 F.2d 909, 913 (6th Cir. 1973), *cert. denied,* 415 U.S. 924 (1974) (18 U.S.C. §922); *United States* v. *Brawer,* 482 F.2d 117, 128-29 (2d Cir. 1973), *cert. denied,* 419 U.S. 1051 (1974) (18 U.S.C. §§2, 371 & 2314).

† *See, e.g.,* 1 Dowsey, *Charges to the Jury and Requests to Charge in a Criminal Case in New York,* Form No. 100, at 6-19, 6-20 (1968).

‡ *See, e.g., Time, Inc.* v. *Firestone,* 44 U.S.L.W. 4262 (March 2, 1976); *Cantrell* v. *Forest City Publishing Co.,* 419 U.S. 245 (1974); *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964).

If reckless disregard can send men to jail and limit a free press, it is an adequate predicate for compensatory damages to victims of securities violations.* Here, of course, there is far more than recklessness: there is actual knowledge. Such conduct is surely sufficient to satisfy the most demanding requirements of scienter.**

Finally, *Hochfelder* looked to the language and history of Section 10(b) and Rule 10b-5 in determining the appropriate standard of scienter. A similar examination of Section 14(e) shows that no requirement of a specific motive to defraud was intended or imposed by Congress.

The Language of §14(e)

Unlike Section 10(b), Section 14(e)'s prohibitions are not limited to fraudulent, manipulative and deceptive conduct. The section, phrased in the disjunctive, also directly prohibits failures to disclose.†

Indeed, Section 14(e) reverses the sequence of Rule 10b-5 and begins with a proscription of misrepresentations and omissions—not fraudulent, deceptive and manipulative conduct. The drafting history of the section, from the first draft, makes manifest Congress' intent to prohibit "mis-

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* Bangor recognizes that recklessness is sufficient but defines it in a way that would exclude all culpable conduct except that showing specific intent to defraud. Its only concession is to say that a court may make such a finding "despite a defendant's protestations of good faith." Br. for Bangor at 49-50, n. That is semantic nonsense.

** Contrary to Bangor's suggestion, recklessness is not raised here for the first time. Br. for Bangor at 61, n. The court of appeals discussed the concept extensively (A 35, 48, 54, n.24, 96, 103).

† *See, e.g.,* 112 Cong. Rec. at 19,007 [SEC Mem.] (what is now Section 14(e) "affords a more practical means of preventing inaccurate or incomplete presentations *or* fraudulent acts or practices . . .") (emphasis added).

leading statements" in addition to fraud. This is of prime significance. *Hochfelder* contrasted Section 10(b)'s language of manipulation and deception with Rule 10b-5(2)'s pro-disclosure language and suggested that the latter, standing alone, could be read as proscribing even nonintentional omissions, if such language had been incorporated in the statute. 96 S. Ct. at 1390. Here, it is in the statute.*

The Legislative History of §14(e)

The legislative history of Section 14(e) also mandates that petitioners' insistence on proof of specific intent to defraud be rejected. The SEC, urging §14(e)'s passage, stated that it would ban omissions and misstatements even though they fell short of outright fraud.** Congress

* Similarly, Judge Friendly in *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1299 (2d Cir. 1973), and the Third Circuit in *Gould* v. *American-Hawaiian Steamship Co.*, [1975-76 Transfer Binder] CCH Fed. Sec. L. Rep. ¶95,512, at 99,597 (3d Cir. 1976), stressed the distinction between the "evil sounding language" of Section 10(b) and the milder language used in the proxy provisions.

Both the Second Circuit and the Third Circuit (which discussed *Hochfelder*) held that negligence was sufficient for liability under Section 14(a). But here, despite Congress' intent to subject tender offers to the same regulation as proxy contests, the Second Circuit rejected negligence as a standard—it found knowing violations and reckless disregard for the truth.

** Chairman Cohen stated:

> "The management may wish to put out literature opposing the bid. The literature may not be subject to easy establishment as being outright fraudulent, but it may be inadequate. It may omit material information.
>
> "In that sense, if anything, the bill would assist both sides." *Senate Hearings* at 178.

In a supplemental memorandum, the SEC again pointed out that the Williams bill would go beyond outlawing fraudulent and deceptive practices, saying:

> "The most flagrant abuses are already subject to the antifraud and antimanipulative rules the Commission has adopted pursuant

(footnote continued on next page)

adopted that principle both by the disclosure language it chose to use in Section 14(e) and by the amendment it rejected. Indeed, even under the more ominous language of the 1934 Act, a requirement of intent to injure or defraud another was rejected for criminal liability as an "impossible standard of proof," in the words of Senator Barkley.*

Thus, the language and the legislative history of Section 14(e), all the precedents and the very rationale of *Hochfelder* all compel the conclusion that specific intent to de-

> to Section 10(b) of the Securities Exchange Act of 1934. But these rules do not provide us with adequate authority to protect investors until we can establish the existence of fraud." *Senate Hearings* at 210.
>
> Moreover, Chairman Cohen asked the House to reject a proposed exemption which would have left management solicitations in opposition to a registered exchange offer subject only to the antifraud rules of Section 10(b). He stated:
>
> > "There are many situations as to which it would be difficult to mount a case of fraud but, as this committee decided back in 1934 with respect to proxy solicitations, this type of industrial warfare, if I may use that expression, should be subject to affirmative requirements which would be developed by the Commission to implement this legislation even if the activities do not rise to the level of fraud. . . ." *House Hearings* at 18.
>
> Congress accepted the reasoning by rejecting the proposed exemption.

* 78 Cong. Rec. 8297 (May 8, 1934). In arguing against a proposed amendment which would require proof of specific intent to defraud, Senator Barkley stated: "To adopt the amendment would make it almost impossible to prove, although a man violates the law, that he intended any injury against any particular person." He added, "It would be easy for any defendant . . . to come in and say, 'I did willfully violate this law . . . but I did not intend to injure anybody.' Under such circumstances, how could the Government prove that what he was saying was not the truth?" *Id.*

To the same effect, Thomas G. Corcoran, a draftsman of the 1934 Act, stated that in civil actions the statute would not be "worth a hoot if a plaintiff should have to prove that the defendant intentionally deceived him." *Hearings on H.R. 7852 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 113 (1934).

ceive is not required. The conduct here establishes scienter under the most demanding requirements of proof that courts could reasonably impose.

Petitioners' Specious Arguments

1. *Petitioners' "Good Faith"*: Despite the legislative history of the Williams Act and the other considerations mentioned above, petitioners assert that they are not liable because the district court concluded that they acted without specific intent to defraud Chris-Craft or without other evil intent. But petitioners' argument and the district court's legal characterizations were rejected by the Second Circuit, for they were based on the district court's erroneous views as to the policy underlying Section 14(e), and conflicted with the district court's own findings and the undisputed facts.

A fair reading of its opinion shows that the district court did not subscribe to Senator Williams' belief that if rivals for control were free to engage in improper tactics, their contests would inevitably degenerate into "industrial warfare" in which the public interest would be sacrificed. *See supra* at 49, n.**, 70-71, n.**. As noted above, a concept of full disclosure and fair play going far beyond outright fraud, was at the very heart of the new statute.

The district court took no note of the legislative history of Section 14(e) and, on the contrary, decided the case under its conception of Section 10(b) standards (A 134). It suggested that sophisticated participants are entitled to little protection under the securities laws and that, in effect, they assume the risk of sharp practices by their rivals, short

of common law fraud (A 127). The court stressed that it had "made it clear that it would not, at the behest of a disappointed contender in a battle for corporate control, necessarily take the same view of the requirements of the securities laws and rules as it does in cases of claimed injury to the average public investor" (D 31). The district court's characterizations of the petitioners' motives was therefore a reflection of its premises that participants in control contests should fend for themselves—a view that Bangor still urges in this Court. Br. for Bangor at 21.*

The Second Circuit, in keeping with the intent of the Williams Act, rejected the district court's permissive attitude toward control contests.** It stressed that the district court had applied erroneous legal standards (A 37). Noting that the facts in this case "are substantially undisputed" (A 7, n.1), it concluded that these facts and the district court's own findings established a clear case of scienter.

As to Bangor: Bangor stipulated that two of its three illegal cash purchases were from broker-dealers and the

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* In view of Bangor's emphasis on scienter, it is significant to note that the district court erroneously ruled (App. 46-1) that Chris-Craft was not entitled to ask Bangor's Chairman Salgo the purposes for which Bangor had engaged Nathan Voloshen, a Washington influence peddler—a point bearing on Bangor's consciousness of guilt. Voloshen had invoked the Fifth Amendment at a pre-trial deposition when asked about his engagement by Bangor. The episode underlines the incongruity of the district court's decision which imposed on Chris-Craft the burden of proving specific intent to defraud, but barred discovery of possible evidence pertaining to state of mind.

** The district court's rejection of the philosophy underlying the Williams Act is also reflected in its opinion in *GAF Corp.* v. *Milstein*, 324 F. Supp. 1062 (S.D.N.Y.) (Pollack, J.), *rev'd*, 453 F.2d 709 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972)—an opinion under Section 13(d) which runs contrary to this Court's rationale in *Rondeau*.

district court flatly rejected Bangor's claim that the third purchase from Cornfeld was not solicited (A 149). It is also undisputed that all of the cash purchases were made in defiance of the warnings published by the SEC and the advice of Bangor's counsel. Nevertheless, the district court speculated that Bangor's "motivation" was to "adhere to" Rule 10b-6. Nobody claims such "motivation" in this Court.

The district court also found that Bangor knew that BAR's represented "fair market value" was inflated, and rejected Bangor's accounting defense (D 14-16, 19). Indeed, Bangor now makes a startling admission of subjective scienter: "BPC has, of course, never contended that in 1969 its directors believed the market value of the BAR to be $18.4 million." Br. for Bangor at 58. Unfortunately, nobody told the public for whose stock Chris-Craft and Bangor were bidding. In light of these facts, the Second Circuit flatly rejected the district court's benign legal characterization of Bangor's behavior as "unintentionally in error" or "negligent." The court found overwhelming evidence of scienter, meeting the standard of "knowledge of falsity or reckless disregard for the truth" (A 35). Bangor was described as making representations of value known to be "deceptive and unrealistic" (A 48), as having committed acts tantamount to "willful fraud" (A 96) (Gurfein, J.) and as ignoring "red flags" of warning (A 106) (Mansfield, J.). No other conclusion is compatible with the facts.

As to First Boston: The district court concluded that First Boston's officers "acted solely in furtherance of what

they believed in good faith to be in the legitimate interests of their clients" (A 159). Indeed, First Boston's attitude could be summed up by the statement in its pretrial brief that it had a "kind of professional privilege" to remain silent. *See supra* at 8. The Second Circuit disagreed with the conclusion that loyalty to clients excuses silence in the face of misrepresentations. It concluded that First Boston, after reading Bangor's minutes, knew enough to deduce that BAR was grossly overvalued, and that First Boston's endorsement and circularization of the false prospectus was "an almost complete abdication" of its responsibilities under Section 14(e) (A 55). No other conclusion is possible in view of First Boston's admitted knowledge of the truth and its decision "to remain silent."

As to the Pipers: The district court found that the "put" in the Grumman contract was a "rational step," not "a sham" (A 136). But, as the Second Circuit noted, the press release about Grumman was a sham because it concealed the put and "portrayed the Grumman agreement as a completely favorable deal" (A 39-40). The Second Circuit thus concluded that the Piper insiders sent the shareholders letters opposing Chris-Craft's offer "knowing that they were materially misleading" (A 38). The Piper insiders' vow to burn the plant before allowing Chris-Craft to acquire control (App. 1890) is telling evidence of their scienter—which the insiders do not seriously contest.

In sum, the undisputed facts and the Second Circuit's analysis of the record and the policy underlying Section 14(e) all support its finding that, at a minimum, petitioners were guilty of reckless disregard of the truth. Whatever

petitioners' motivations, their conduct could only have been intended to injure Chris-Craft, whose tender offers they were opposing. Petitioners' *post hoc* subjective rationalizations and legal labels cannot obscure the Second Circuit's unanimous scienter conclusions in *CC II* and *CC III*. Acceptance of petitioners' arguments would make Section 14(e) a dead letter.

2. The Scienter Round-Robin:

Bangor: It claims that it lacked scienter as to the illicit $9 million cash purchases, arguing a lack of knowledge of any contrary rule and reliance on counsel. Br. for Bangor at 51-54.* That is false. *See supra* at 13-14, 32. Bangor also claims that it lacked scienter with respect to BAR's inflated value, arguing that it relied on First Boston, counsel and accountants. Br. for Bangor at 57. But all the courts below found that Bangor's top management *knew* that BAR was over-valued and that this could not be justified on any so-called accounting principle (D 13, 14; A 48).**

* Bangor previously conceded that scienter was not required for its 10b-6 violation. Pet. for Bangor for Certiorari at 11, n. (1973).

** Petitioners' record citations refute its claims of reliance on accountants. To the extent there was any evidence of discussion with accountants, it was highly incriminating as to the $18.4 million "fair market value" of BAR. Bangor, which did not call its auditors to testify, stipulated that they advised that the sale of BAR's stock would create an extraordinary loss of $13.5 million (D 6). Unwilling to show that loss, Bangor next asked about the tax consequence of an asset sale and was told that this would require long study (D 8, n.6; App. 1759-61). After hearing this advice, Bangor chose to defer formal approval of a sale and to continue to carry BAR at a fair market value which the district court found could not be justified by any principle of accounting (D 14). The district court held that the BAR disclosure was management's, not the accountants', responsibility (D 19).

In an effort to gloss over the BAR misrepresentation, Bangor refers to the $18.4 million figure by every term except what it was—a "market price evaluation."* Accounting rules permitting assets to be carried at historic cost do not justify a representation that a railroad has a market value almost four time its actual worth. The district court and the Second Circuit so found.

First Boston: It claims a lack of scienter as to BAR on the theory that it relied on Bangor and counsel. Br. for First Boston at 16, 38-40. But First Boston itself knew from Bangor's minutes that BAR's value was exaggerated (A 51-55). No court found that First Boston relied on counsel. Indeed, First Boston argued below that it had a privilege akin to a lawyer's "to remain silent."

First Boston's claim that it relied on Bangor is the mirror image of Bangor's claim that it relied on First Boston. Br. for First Boston at 40. Furthermore, as the Second Circuit stressed, First Boston had an obligation "to reach a careful independent judgment based on facts known to it" (A 51). That was especially important here because First Boston promised the public that it would check the value of Bangor's offer based on various factors including Bangor's assets. *See supra* at 21.**

* EV 99. Avoiding the use of this term, Bangor calls this figure "carrying or book value" and "appraisal figure" and "carrying value." Br. for Bangor at 54, 58.

** *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255, 268 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972), imposed 10b-5 liability because investment bankers had not given sufficient emphasis in proxy material to the *disclosed* facts that their endorsement of an amalgamation plan "was not based on an independent survey of assets and operation" but "relied solely on data supplied by . . . management." Here, First Boston did not even disclose that it allegedly relied solely on Bangor's appraisal—or, far worse, that it knew that the appraisal was almost four times greater than true value.

Finally, First Boston argues that a further investigation would not have disclosed information as to the timing of BAR's sale. That misses the point: First Boston knew that BAR was worth $5 million, not $18.4 million, whether or not a sale was imminent.*

Piper Insiders: To complete the circle, they claim that they relied on First Boston. Br. for Piper at 6, 7. In turn, First Boston has contended that it was just a hired hand who took its orders from the Pipers (A 55, n.25). But the insiders, and their advisor, both *knew* that Grumman had an option, not a commitment, to invest $20 million in Piper. Since Piper's president admitted that the Grumman affair was designed to injure Chris-Craft, scienter was conceded. The insiders also imply a lack of scienter because they allegedly reached a bona fide decision to oppose Chris-Craft for the benefit of shareholders. Br. for Piper at 45. But whatever the insiders' self-justification for the "scorched earth" policy, they were not free to lie to achieve their objectives.

In summary, petitioners' argument that, despite actual knowledge of the damning facts, they lacked subjective malice in their nine month campaign against Chris-Craft, is a game of semantic gymnastics in an "area where glib generalizations and unthinking abstractions are major occupational hazards." *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 465 (1969). The undisputed facts, rather than legal labels or psychological standards, spell out scienter under any objective standard.

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* First Boston also claims that if it had spoken to Dumaine it would not have learned that a sale was likely. Br. for First Boston at 39, n.20. That, of course, is not what Dumaine and Hutchins thought (D 11, n.9).

IV

PETITIONERS' VIOLATIONS CAUSED INJURY TO CHRIS-CRAFT.

There is no merit to petitioners' claims that the Second Circuit used erroneous principles of causation. Here, the existence of causation was a matter of mathematics and went far beyond the showing required by standards established in *Mills*, *Ute* and *TSC*.

Thus, as the Second Circuit repeatedly stressed, Bangor's control depended on its illegally-acquired shares (A 60, 67, 96, 110). The causation arithmetic in this extremely close race was as follows:

1. Bangor acquired 7½% of Piper's stock for cash in violation of Rule 10b-6.
2. Bangor obtained an additional 7% of Piper's stock by its materially misleading exchange offer.
3. Without either illegal block, Bangor would lack its 50% majority.
4. Without both blocks, Chris-Craft would have led by at least 41% to 31% at the end of the competing exchange offers in August and could not have been overtaken, according to the experts. Petitioners' expert conceded that such a lead would have been "formidable" (App. 2876); respondent's expert termed it a 99-to-1 certainty (EV 831). And the Second Circuit in *CC III* noted that Chris-Craft's plurality lead would normally have commanded a

premium for the opportunity to obtain control (B 25).

5. In fact, Chris-Craft would have had an even larger lead because the petitioners dissuaded Piper's public shareholders from tendering more shares to Chris-Craft at the beginning of the contest and on the exchange offer (A 65).

Petitioners cannot overcome these figures. This is a textbook case in which the illegal acquisitions actually reversed the outcome of a close contest and gave Bangor control of Piper. Causation could not be clearer.

The 7½% Obtained by Illegal Cash Transactions

There is no serious denial that Bangor's illegal acquisition of the key 7½% blocks from Cornfeld and others tipped the balance against Chris-Craft. Indeed, in the middle of the control contest, Bangor boasted that this sealed Chris-Craft's fate.*

The facts here are overwhelming. Petitioners believed that the pivotal blocks were leaning to Chris-Craft. *See supra* at 12. The SEC publicly announced that their purchases would be unlawful. Chris-Craft obeyed. Bangor did not. Cause and effect, as the Second Circuit pointed out, were obvious. Judge Timbers declared, "Even arithmetically, it is apparent that the block purchases in violation of Rule 10b-6 were essential to achieve control" (A 67). Judge Gurfein stated, "since the block purchases were necessary for control causation was established" (A 96). And

* Complaint in *Bangor Punta Corp.* v. *Chris-Craft Indus., Inc.*, 69 Civ. 2354 (S.D.N.Y. June 2, 1969) ¶11 D, *quoted supra* at 15.

Judge Mansfield concurred that "BPC's unlawful purchases of Piper shares enabled it to gain control of Piper . . . ." (A 111)

But petitioners speculate that if Bangor had not acquired the shares illegally in May, it might have been able to buy them legally at some other time, for example, in August, after the exchange offers ended. Br. for First Boston at 45. And Bangor adds that Chris-Craft "would, of course, have suffered exactly the same 'injury' if BPC's purchases" had been made ten days earlier or two months later, when they would have been lawful. Br. for Bangor at 34. But

> "[d]efendants cannot accomplish by deception what they might have accomplished honestly and then be heard to say that the deception was not the cause. Lawsuits are determined by what was and not what might have been." *Eagle* v. *Horvath*, 241 F. Supp. 341, 344 (S.D.N.Y. 1965).*

Moreover, if Chris-Craft had led 41% to 31% in mid-August (the situation that would have existed but for Bangor's illegal 14½% blocks), it is unlikely that Bangor would have risked $9 million for these blocks, if they were available. Bangor had a policy against spending cash unless it was sure of victory (EV 300). Trailing 41% to 31%, it would have been a sure loser (App. 2430-31, 2629-30, 2722, 2876, 3020).

* This proposition is an application of the principles established in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946). *See infra* at 89-90.

The 7% Obtained by the False Exchange Offer

Causation was also established beyond dispute in connection with Bangor's misleading exchange offer by which it obtained 7% of Piper's shares—another block critical to its 50% position. The offer concealed BAR's $13 million loss, which would have wiped out 36% of Bangor's retained earnings and 12% of its equity (A 46; D 15), and converted Bangor's per share earnings from more than $3 to a loss of almost $1.30 (D 15). These would have been material facts under any circumstances. They were especially material here because Piper stockholders were faced with competing exchange offers which they found equally attractive: they tendered 112,000 shares to Chris-Craft and 111,600 to Bangor in the competing exchange offers (A 18). Disclosure of the huge BAR loss, with its devastating effect on earnings and net worth, surely would have had a dramatic impact.

On this point, the Second Circuit was again unanimous. Judge Timbers stated, "Since BPC eventually acquired only about 51% of the outstanding Piper shares, it is clear that the 7% acquired through its exchange offer was critical to its success" (A 60). Judge Gurfein stated that "the seven per cent illegally acquired by BPC caused it to win" (A 95). Judge Mansfield agreed (A 110).

Those conclusions are clearly correct. Here, the lower courts found that the BAR misrepresentation was material (A 45; D 15-16), and that it was an "essential link" to Bangor's obtaining control (A 60, 95, 110). Under those circumstances, causation is established as a matter of law, under the Court's opinions in *Mills, Ute* and *TSC*.

Thus, in *Mills,* shareholders complained about a proxy statement that was defective because it failed to disclose certain facts with sufficient emphasis. This Court stated:

> "Where the misstatement or omission in a proxy statement has been shown to be 'material' . . . that determination itself indubitably embodies a conclusion that the defect was of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote. This requirement [is] that the defect have a significant *propensity* to affect the voting process . . . .
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> "There is no need to supplement this requirement, as did the Court of Appeals, with a requirement of proof of whether the defect actually had a decisive effect on the voting. Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if . . . he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction. This objective test will avoid the impracticalities of determining how many votes were affected, and, by resolving doubts in favor of those the statute is designed to protect, will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions." 396 U.S. at 384-85 (footnote omitted; emphasis in original).

In *Ute,* where defendants failed to make complete disclosure to members of a class who sold stock, this Court declared:

> "Under the circumstances of this case, involving primarily a failure to disclose, positive proof of re-

liance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. . . . This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact. *Chasins* v. *Smith, Barney and Co.*, 438 F.2d at 1172." 406 U.S. at 153-54.

Mills and *Ute* were recently reaffirmed by this Court in *TSC*. There, the Court summarized those decisions: "So long as the misstatement or omission was material, the causal relation between violation and injury is sufficiently established . . . if 'the proxy solicitation itself . . . was an essential link in the accomplishment of the transaction.'" 96 S. Ct. at 2130-31, *quoting Mills*. And the Court stressed that the materiality standard

> "does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder." 96 S. Ct. at 2133.

Here, the courts found that the misrepresentations would have been significant to Piper shareholders in their consideration of Bangor's exchange offer (A 45-46; D 15-16). The unlawfully acquired shares were an "essential link" necessary to give Bangor 50% control. And unlike *Mills*, the contest here was a close one.

The petitioners attempt to distinguish *Mills* and *Ute* on the ground that Piper's stockholders, rather than

Chris-Craft, relied on the false BAR valuation. But this is a distinction without substance. As the Second Circuit held in *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970):

> "When Crane entered the securities market with its tender offer, it was entitled to the Act's protection not only against being deceived itself but also against deception of the investing public designed to prevent the public from entering into securities transactions." 419 F.2d at 796.

And this Court declared in *Borak*, 377 U.S. at 432, "The damage suffered results not from the deceit practiced on [the shareholder] alone but rather from the deceit practiced on the stockholders as a group."* Indeed, in *Mills* itself, other shareholders, not the plaintiff, were misled. This principle applies with added force to tender contests. For Section 14(e) was especially drawn to bar misleading statements in opposition to tenders—statements typically made to target shareholders to discourage them from accepting a rival's offer.**

The application of the *Mills-TSC* standard is particularly appropriate here. As Justice Harlan noted in *Mills*:

> "Proof of actual reliance by thousands of individuals would, as the court [below] acknowledged, not be

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* *See also Herbst* v. *International Tel. & Tel. Co.*, 495 F.2d 1308, 1315-16 (2d Cir. 1974) (Lumbard, J., following *CC II*); *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972); *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627, 635 (2d Cir. 1967); *Union Pacific R.R.* v. *Chicago & North Western Ry.*, 226 F. Supp. 400 (N.D. Ill. 1964).

** Petitioners argue that *Mills* and *Ute* are inapposite because those cases were decided under Sections 14(a) and 10(b). That argument defies Congress' intent to equate tender offer and proxy regulation. *See supra* at 41-42.

feasible, see R. Jennings & H. Marsh, Securities Regulation, Cases and Materials 1001 (2d ed. 1968); and reliance on the *nondisclosure* of a fact is a particularly difficult matter to define or prove, see 3 L. Loss, Securities Regulation 1766 (2d ed. 1961)." 396 U.S. at 382, n.5 (emphasis in original).*

The Second Circuit made the same point here:

> "The fact that CCI was not directly deceived is what makes application of the *Mills-Ute* test appropriate and essential. It would be unduly burdensome to require an offeror to prove actual reliance when, as here, there are numerous shareholders who undoubtedly possess a wide range of expertise and knowledge. It would be impractical to require CCI to prove that each individual Piper shareholder who failed to trade for CCI's stock, or who traded for BPC's stock, relied upon defendants' misrepresentations in doing so." (A 59)

Finally, Bangor claims that it never had an opportunity to rebut causation under the *Mills-Ute* standard. This is false. Chris-Craft relied on *Mills* and *Crane* from the outset of the liability trial (*Ute* was decided later). Bangor attempted to prove through expert testimony that reasonable stockholders would not have been affected by a loss on BAR. But both courts below found that the disclosure would have been highly material (A 45; D 15-16).

Petitioners' Speculations

Petitioners advance a series of speculative factual arguments, which boil down to a claim that perhaps they would have won even if they had not violated the law; and that

* Bangor's argument that Chris-Craft could have called large institutional shareholders to testify is disingenuous. Br. for Bangor at 74, n. Bangor preempted the key large blocks by its unlawful cash purchases in May.

Chris-Craft must, and cannot, show with definite certainty that it would have won if the race were not rigged. Acceptance of that view would make it impossible for victims ever to prove causation in control races: the more egregious the wrong, the more impossible the proof. In *Bigelow*, this Court flatly rejected such cynical arguments.

(1) Thus, Bangor claims that "there is no good reason to think that any Piper shareholders were influenced by the BAR omission at all." Br. for Bangor at 74, n.**. That flies in the face of the specific findings below that the omission would have been regarded as material by a reasonable Piper shareholder. *See supra* at 35.

(2) Petitioners conjecture that if the facts about BAR had been disclosed and had caused Bangor's exchange offer to fail, Bangor might have acquired the tendered shares later for cash. Br. for First Boston at 22, 44; Br. for Bangor at 77-78. But a party who wins illegally cannot later speculate that he might have won anyway. And this argument ignores the fact that Chris-Craft had a simultaneous competing exchange offer and might have attracted many of the shares tendered to Bangor if the bad news about BAR had been disclosed. To carry the speculation one step further, if the 111,600 shares Bangor acquired had not been tendered to either side and if Chris-Craft led 41%-31% at the end of the exchange offers in an honest race, Bangor clearly would not have paid cash for those shares in view of its hopeless position and its policy against spending cash unless control were assured (EV 300).

(3) Petitioners speculate that Bangor might have acquired the illicit 7½% cash blocks lawfully some other way

on some other day. But the fact is that they did not; and, indeed, one can infer that Bangor had some reason to believe that it could not have done so, because it bought the blocks while its exchange offer was pending—not earlier or later—in defiance of its own counsel's warnings.

(4) Petitioners also claim that Bangor won because its offers were higher, and Chris-Craft had run out of funds. Those claims are based on distortions of the record and the opinions below.* Again, if Bangor's offers were better, and if Chris-Craft had run out of cash, Bangor would not have found it necessary to violate the law so often.

(5) The Piper insiders claim that their fraudulent January statements could not have injured Chris-Craft because the contest was not definitely decided until several months later. Br. for Piper at 34. But those misleading

* Bangor did not spend more cash than Chris-Craft. It spent about $17 million in cash; Chris-Craft spent more than $38 million in cash (A 18; App. 478-79, 488). Significantly, Bangor spent cash only twice: for the illegal 7½% purchases in May and for the 5% market purchases in August which sewed up its illegally-gained victory. Bangor's additional claim that its exchange package was worth more than Chris-Craft's competing offer is belied by the fact that Chris-Craft's offer attracted more Piper shares.

In claiming that Chris-Craft had run out of cash, petitioners refer to remarks by Judge Mansfield in his partial dissent in *CC II* as to the Pipers—remarks dealing with the period in January immediately after Chris-Craft's $65 cash tender (A 112-16). But the majority in *CC II* found that Chris-Craft *had* available cash resources in January (A 61-63). And, moreover, at the subsequent damage trial in *CC III*, Chris-Craft demonstrated through its financials that it had over $10 million in cash on hand for Piper purchases from April through August; and Chris-Craft's banker testified that funds definitely would have been made available in August if Chris-Craft led 41% to 31% in a lawful race (App. 3085-87, 3105). That testimony was undisputed. The bank obviously would not have allowed Chris-Craft to end up in a locked-in minority position when majority control was within its grasp.

statements, as the Second Circuit stressed, discouraged Piper shareholders from tendering more stock to Chris-Craft in January and also had a continuing adverse impact on Chris-Craft's later offer to Piper shareholders (A 62-63).*

Petitioners' speculative arguments offend principles recognized in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946). There, as here, defendants argued that plaintiff could not recover unless it established that it definitely would have been better off under conditions that might have prevailed in a free marketplace not affected by defendants' antitrust violations. In rejecting that contention, this Court declared:

> "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.
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> "The most elementary conception of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created. See *Package Closure Corp.* v. *Sealright Co.*, 141 F.2d 972, 979. That principle is an ancient one, *Amory* v. *Delamirie*, 1 Strange 505, and is not restricted to proof of damage in antitrust suit. . . .
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* The Second Circuit's strict standard of causation is illustrated by its holding that the Piper insiders were not liable for their material concealment of their $13 million bonus, because Chris-Craft had called the bonus to the attention of Piper shareholders (A 63).

"The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done." 327 U.S. at 264-65.

There is no genuine question of causation in this case. The arithmetic speaks for itself: without all of petitioners' violations, Bangor could not have achieved its 50% majority. Petitioners' only answer is the type of speculative and self-serving arguments condemned by this Court in *Blue Chip*, 421 U.S. at 745-46. If such conjecture does not give an innocent victim a sword with which to sue, it surely cannot provide a shield for the law breaker.

V

THE SECOND CIRCUIT CALCULATED DAMAGES CORRECTLY.

Having played for high stakes in a multi-million dollar contest, having repeatedly violated the law, and having caused massive injury to Chris-Craft's investment, petitioners now complain about the amount of damages they are required to pay. Yet, the Second Circuit emphasized that its award was "the minimum amount of damages that the district court could have awarded without committing reversible error" (B 25). It also double-checked its award against petitioners' expert's computations for a private sale (B 31-32, n.24).

The Damage Calculation Was Conservative

The Second Circuit stressed that damages should compensate Chris-Craft for both elements of the injury caused by petitioners' violations: (1) the lost opportunity to compete for control in a race in which Chris-Craft would have enjoyed a formidable lead but for petitioners' violations; and (2) the wrongful conversion of Chris-Craft's multi-million-dollar plurality into an illiquid 42% minority.

In calculating minimum compensatory damages, the court applied traditional principles and valued Chris-Craft's block *before* and *after* Bangor's illegal seizure of control. For the pre-violation figure, the court used Chris-Craft's actual average cost ($64 per share), although it recognized that a large plurality block would ordinarily have been worth substantially more in an honest race (B 25-26). For the post-violation figure, the court used $27 per share, the highest price that Chris-Craft could have realized on a public sale on assumptions most favorable to petitioners. The court noted that the only realistic way for Chris-Craft to mitigate damages after Bangor's preemption of control was by a registered public offering of its 700,000 shares; that an offering required a registration statement (including audited financials and other time-consuming steps) and could not have taken place until January 1970 at the earliest; and that $27 was the best price that Chris-Craft could have obtained then (B 28-30).*

By using the most conservative figures and assumptions, the Second Circuit calculated damages at $37 per share ($64

* That was a favorable view for petitioners because, in fact, Piper's 1969 audited financials were not ready until May 1970, by which time the market had collapsed. *See supra* at 25, n.

average cost minus $27 resale price). The court then verified this "minimum" award by an alternative calculation, using the testimony of petitioners' principal expert, Gant, based on the price that Chris-Craft could have realized on a private sale the day Bangor took control, on September 5 (B 31-32, n.24).

The cases support the Second Circuit's damage measure. In calculating compensatory damages under the securities laws, the starting point is the cost of plaintiff's shares.* The downside figure is the price that the victim could have realized on a resale.** If there is an unavoidable delay in a resale and market conditions change, that is a risk as-

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* *See, e.g., Harris* v. *American Inv. Co.*, 523 F.2d 220, 225 (8th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3398 (Jan. 13, 1976); *Foster* v. *Financial Technology, Inc.*, 517 F.2d 1068 (9th Cir 1975); *Chasins* v. *Smith Barney & Co.*, 438 F.2d 1167 (2d Cir. 1970); *Esplin* v. *Hirschi*, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969); 6 Loss, *Securities Regulation* 3922-23 (Supp. 1969). Using cost as the starting point in calculating damages for fraud is also traditional in non-securities cases. *See, e.g.*, Restatement (Second) of Torts §549(1) (Tent. Draft No. 10, 1964).

** *Chasins* v. *Smith, Barney & Co., supra; Esplin* v. *Hirschi, supra*, at 104-05; *Myzel* v. *Fields*, 386 F.2d 718, 742, 745 (8th Cir.), *cert. denied*, 390 U.S. 951 (1967); *cf. Schwartz* v. *NMS Indus., Inc.*, 517 F.2d 925, 931 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3398 (Jan. 13, 1976). Professor Loss states, "Where there is no market, it has been held that 'fair value is to be determined from all of the pertinent circumstances both for a reasonable time before the sale and after it. . . . If there can be no exact calculation . . ., the wrongdoer cannot complain if a reasonable approximation is reached.' *Ross* v. *Licht*, 263 F. Supp. 395, 410 (S.D.N.Y. 1967) . . . ." 6 Loss, *Securities Regulation* 3923 (Supp. 1969). *See also* Restatement (Second) of Torts, *supra*, §549, comment *c* at 153.

sumed by the wrongdoer.* Above all, when wrongdoers make precise damage computations difficult, all uncertainties must be resolved against them under the settled principle articulated in *Bigelow* and other cases.**

Thus, in *Gould* v. *American-Hawaiian Steamship Company*, [1975-76 Transfer Binder] CCH Fed. Sec. L. Rep. ¶95,512 (3d Cir. 1976), large stockholders received a premium above the price received by small stockholders on a merger. The Third Circuit awarded damages based on its estimate of the additional amount plaintiffs might have been able to bargain for if the proxy materials were not misleading:

> "It is always difficult to measure the damages resulting from a lost opportunity, especially one, such as we have here, which has no ascertainable market value.

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* Thus, in *United States* v. *Swift & Co.*, 270 U.S. 124 (1926), where the Army breached its contract to purchase large quantities of special bacon, the Court rejected the claim that Swift should have mitigated by reselling sooner, when the market was higher, because of the difficulties in disposing of the sizable amounts of "this peculiar kind" of bacon. The Court stated: "This was a case where the only standard could be the contract price and the amount realized at actual sale by diligent effort." 270 U.S. at 149. Chris-Craft's large and illiquid Piper block, salable if at all by a registered public offering, is strikingly analogous to Swift's salty Army bacon. *See also Schwartz* v. *NMS Indus., Inc.*, 517 F.2d 925, 931 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3398 (Jan. 18, 1976); *cf. In re Kellett Aircraft Corp.*, 186 F.2d 197, 198-99 (3d Cir. 1950); *and see* Restatement (Second) of Torts, *supra*, §549, comment *c* at 154.

** *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946). *See Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931); *Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U.S. 359, 379 (1927); *Lehrman* v. *Gulf Oil Co.*, 464 F.2d 26, 46 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972).

> Many imponderables are involved .... Moreover, here there is no known fixed amount, such as a prize, the opportunity to acquire which has been lost. In these cases the risk of uncertainty as to the amount of damages is cast on the wrongdoer and it is the duty of the fact finder to determine the amount of damage as best he can from all the evidence in the case. If this were not so, section 14(a) could be violated with impunity in any situation in which the violation does not cause out of pocket loss." *Id.* at 99,601 (footnote omitted).

Here, Chris-Craft not only lost the "prize" (control of Piper), but suffered substantial "out of pocket loss" (destruction of its $60 million investment).*

Petitioners' Claims Are Fallacious

The "fundamental flaw" in the damage measure, according to Bangor, is that it was not keyed to Chris-Craft's injury. Br. for Bangor at 82. Bangor defines that injury as follows: "CCI lost, at the very most, only an opportunity to compete for control." *Id.* at 88. This mistakenly assumes that Chris-Craft merely bought a raffle ticket and lost a chance to win the prize. In fact, Chris-Craft lost far

* There is a hollow ring to petitioners' protestations of hardship from the damage award. Those claims, legally irrelevant, ignore the massive injury to Chris-Craft, which has been in precarious financial condition for the past six years as a result of petitioners' violations. Moreover, while prosperous First Boston now claims that the judgment represents a significant share of its net worth, Br. for First Boston at 53, its Chairman publicly announced that in the unlikely event that First Boston paid the entire judgment, the net after-tax effect would be only $16 million, and that its financial integrity would not be impaired. *Wall St. Journal*, April 16, 1975, at 8, col. 3. This, of course, takes no account of contribution.

more: its 700,000 share position was transformed from an attractive plurality into an illiquid permanent minority.*

Bangor contends that the Second Circuit's damage formula, including what Bangor calls indemnification "for market losses," would have been proper if Bangor had induced Chris-Craft to enter the contest. Br. for Bangor at 90-91. But in fact Chris-Craft was induced: it invested millions of dollars in the justifiable belief that its rivals would comply with the law (A 60; B 26). Chris-Craft would not have invested a cent, no less $60 million, if it knew that its rivals could win by illegal tactics.** In these circumstances, the court's damage theory is too lenient. Chris-Craft had asked the court to compel Bangor to buy its block at cost.† The Second Circuit did not adopt that approach, which would have eliminated all uncertainties, because it was willing to assume (favorably to petitioners) that Chris-Craft might have been able to sell its 700,000 shares via a registered public offering (B 31, n.23).

* In accordance with petitioners' "zero damages" theory, the district court ignored this critical fact by equating Chris-Craft's 700,000 shares with a readily salable "anonymous 100-share block" (B 52). The court of appeals pointed out the obvious fallacy of concluding that 700,000 shares of Piper had the same value per share as one hundred readily-marketable shares (B 19).

** While Chris-Craft, in paying an average of $64 per share for its Piper stock, assumed the ordinary risk that it might lose a fair contest, it did not assume the extraordinary risk that it would be a sure loser in a rigged contest (A 60).

† This is an appropriate remedy. *See, e.g., Gordon* v. *Burr*, 506 F.2d 1080 (2d Cir. 1974); *Gerity* v. *Cable Funding Co.*, 372 F. Supp. 679, 683 nn.4 & 5 (D. Del. 1973); 3 Bromberg, *Securities Law, Fraud: SEC Rule 10b-5*, §9.1, at 226 & n.2 (1975). *Cf. Gottlieb* v. *Sandia American Corp.*, 304 F. Supp. 980, 989-91 (E.D. Pa. 1969), *aff'd in part, rev'd in part on other grounds*, 452 F.2d 510 (3d Cir.), *cert. denied*, 404 U.S. 938 (1971).

Bangor objects to the use of Chris-Craft's $64 cost, claiming that Chris-Craft made "a bad investment."* Br. for Bangor at 85-86. But Bangor paid $80 per share, and its president insisted that it acted prudently (*see* B 22, n.15). In any event, actual cost is the traditional basis for computing damages, as shown by the precedents by Judges Cardozo and Learned Hand, cited by the Second Circuit (B 22 & n.15).** Here, the Second Circuit's use of cost, rather than a higher value including a control premium, was intentionally favorable to petitioners (B 25-26).

Bangor criticizes the Second Circuit for using as the post-violation value of Chris-Craft's block the best price obtainable in a January public offering. Bangor states "The long delay [between September and January] was based on an assumption—never briefed or argued—that CCI would have had to register its Piper shares and that it would take that long to do it." Br. for Bangor at 86. That is false: the point was the subject of testimony given on the very first day of the damage trial (App. 2435-39), testimony that was never disputed by petitioners' witnesses. In fact, the experts for both sides agreed that, in addition to legal requirements, registration was a practical necessity for a public sale of 700,000 shares (App. 2436-39, 2828-30).

Petitioners argue that the $27 figure in effect compensates Chris-Craft for the stock market decline between

* Bangor's alternate claim, Br. for Bangor at 85, that $64 was not Chris-Craft's cost is contrary to the stipulated facts (App. 487-89). Bangor never challenged the cost figures before.

** *Borg* v. *International Silver Co.*, 11 F.2d 147, 152 (2d Cir. 1925) (L. Hand, J.); *Triangle Waist Co.* v. *Todd*, 223 N.Y. 27, 31 (1918) (Cardozo, J.). *See also Levin* v. *Mississippi River Corp.*, 59 F.R.D. 353, 370 (S.D.N.Y. 1973) (Weinfeld, J.), *aff'd sub nom. Wesson* v. *Mississippi River Corp.*, 486 F.2d 1398 (2d Cir. 1974).

September and January. But Chris-Craft was trapped during that period as a result of petitioners' violations. No outsider would touch Chris-Craft's huge minority block (B 28-29). And Bangor, the only realistic buyer of this large minority position, refused to extend its exchange offer for Chris-Craft: Bangor believed that with Chris-Craft unable to dispose of its shares, time would work to Bangor's advantage and that it would "treat" with Chris-Craft after it had come under pressure from its bankers (App. 1885-86). Having caught Chris-Craft in a snare, the wrongdoers must assume the risk of any market shifts, up or down, until the earliest opportunity for a sale.

Moreover, petitioners' repeated claims about the five-month market decline are undermined by their principal expert, Gant, who calculated the price Chris-Craft could have realized on September 5, the day Bangor gained control, by a private sale, assuming that a buyer could be found (B 31-32, n.24). A private sale was the only theoretically possible method of resale in September, and Gant's computations produced approximately the same damages in September as an assumed January public offering. *Id.*

Indeed, petitioners attack on the five-month "delay" is a red-herring. In reality, there would have been a nine-month delay because Piper's financials were not ready until May.

Petitioners also contend that the Solicitor General disagreed with the Second Circuit on the damage issue. The Solicitor, in fact, calculated idential damages by an alternative formula. Brief for the United States as *Amicus Curiae* Opposing Certiorari at 23-24. His theory parallels

the Second Circuit's own alternative calculation based on the testimony of petitioners' expert (B 31-32, n.24).

Petitioners further argue that Chris-Craft would have suffered a decrease in the value of its holdings even if it had won majority control because of stock market fluctuations. Br. for Bangor at 87; Br. for First Boston at 48; Br. for Piper at 49. But if Chris-Craft had won, it would have had no reason to sell (App. 2834); and if it ultimately chose to do so, it could have waited for optimum market conditions. Indeed, as a majority holder, Chris-Craft could have used a market decline to its advantage: market dips provide a unique opportunity to acquire large minority blocks by purchase or merger (App. 2521-22).

But Chris-Craft does not enjoy majority status. Because of petitioners' violations, it is a minority shareholder of Piper, really no more than a tenant at will who can be sure of only one thing—that a merger will be compelled by Bangor at a time when Chris-Craft's block can be taken for a song.* For this reason, the minority interest in Piper is of virtually no value to Chris-Craft and was not even regarded as good collateral by its bankers (App. 3120-21). It is, as the Second Circuit recognized, an encumbrance—a minority position unique because of its huge size and illiquidity (A 60).**

* Bangor's ill-gotten power to compel a merger still remains. Its exercise has merely been deferred by the lower court until 1979. Final Judgment and Decree, dated November 22, 1974.

** Courts have traditionally given discounts of as much as 50% for large minority blocks. *Kaufman* v. *Diversified Indus., Inc.*, 460 F.2d 1331, 1335-36 (2d Cir.), *cert. denied*, 316 U.S. 689 (1972); *Helvering* v. *Maytag*, 125 F.2d 55 (8th Cir.), *cert. denied*, 316 U.S. 689 (1942).

Bangor's president acknowledged that minority and majority positions were different species when he admitted that Bangor's purchase of control of Piper at $80 a share was a prudent investment (B 26; App. 2968-69); and that he would not trade places with Chris-Craft or sell Bangor's illegally acquired swing blocks to it (App. 1885, 2995). That testimony punctures the rhetoric of petitioners' briefs.

The sale of Chris-Craft's interest is not just a matter of mitigation of damages, but an economic necessity caused by petitioners' violations. Because of Bangor's seizure of control, Chris-Craft is in the position of a "forced seller," while Bangor is in the position of the only buyer.

The Court of Appeals Had the Power to Calculate Damages

There is no merit to the claim that the Second Circuit switched damage theories and should, in any case, have remanded the case to the district judge for a new damage trial. Br. for Bangor at 91-96. Chris-Craft tried its damage case on the very theory the Second Circuit applied in *CC III*, which was proclaimed in the proposed pretrial orders, the experts' reports (*e.g.*, EV 820-21) and the pretrial brief. Petitioners' principal witness also testified on that theory. Petitioners merely want another damage trial. Seven years of litigation have been enough.*

* Byrd v. *Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525 (1958), cited by Bangor, is inapposite. There, the lower court had struck an affirmative defense and plaintiff thus had no opportunity to present evidence with respect to that defense. This Court held that the appellate court should not have reinstated the defense and granted judgment for the respondent, without a remand to give the plaintiff a chance to present its evidence on that defense. The other cases cited by Bangor similarly involve a dismissal or other summary disposition of an issue. *See* Br. for Bangor at 93. Here, in contrast, the trial judge, at the beginning of the trial, expressly invited the parties to present their evidence on *all* damage theories (App. 2404), and both sides did so.

The Second Circuit's decision to calculate the "minimum" permissible damages rather than to remand the case again was clearly a proper exercise of its discretion under 28 U.S.C. §2106. Here, there was an undisputed factual record as to the key factors necessary to make a "minimum" damage calculation.* Here, petitioners have the burden of proof on mitigation. Here, the litigation had already been in the district court three times and had dragged on for six years to the grave prejudice of Chris-Craft, most of whose assets remain frozen in its illiquid minority position. Here, the trial judge had twice rejected the appellate court's directions.** And here the Second Circuit made a conservative award and resolved all doubts in petitioners' favor precisely because it was making the calculation itself (B 25-26, 32, n.24). In such circumstances, appellate courts clearly have the discretion to fix damages themselves.†

* The Second Circuit stressed that it could compute damages on the basis of undisputed facts in the record (B 23-24). Petitioners now feebly suggest credibility questions and issues of fact. But as to the critical facts, Chris-Craft's cost and resale price, there was no dispute. There were, in fact, no significant factual controversies at the damage trial. The differences related to legal theories of damages. Chris-Craft presented its theory of damages (cost less resale value). Petitioners' witnesses testified both on Chris-Craft's theory and on petitioners' own theory of "zero damages" (statutory appraisal value of 100 shares before and after Bangor took control).

** The trial court did not conceal its disagreement with the Second Circuit's view on the merits, saying, among other things, "the district court must follow the mandate of the Court of Appeals however erroneous the lower Court may deem that mandate to be" (B 50, n.6; *see also* B 46, 49-50).

† *See, e.g., Petition of United States Steel Corp.*, 479 F.2d 489, 500-01 (6th Cir.), *cert. denied*, 414 U.S. 859 (1973); *Georgia-Pacific Corp.* v. *U.S. Plywood Champion Papers, Inc.*, 446 F.2d 295, 299-300 (2d Cir.), *cert. denied*, 404 U.S. 870 (1971); *Oil Screw Noah's Ark* v. *Bentley & Felton Corp.*, 322 F.2d 3, 9 (5th Cir. 1963); *Texas Co.* v. *R. O'Brien & Co.*, 242 F.2d 526, 529 (1st Cir. 1957); *Smith* v. *Dravo Corp.*, 208 F.2d 388, 391 (7th Cir. 1953); 9 Wright & Miller, *Federal Practice & Procedure* §2577, at 699-701 (1971).

Finally, petitioners' objection to the interest award is untenable. In *Blau* v. *Lehman*, 368 U.S. 403, 414 (1962), the Court stated that interest is "given in response to considerations of fairness." The district court awarded interest, and the Second Circuit, which had the power to fix damages, clearly had the power to direct that interest be computed on the adjusted award.* In this case, Chris-Craft's actual carrying charges on its frozen investment far exceeded the allowed interest.

VI

FIRST BOSTON'S CLAIM OF IMMUNITY UNDER THE 1933 ACT IS SHAM.

The main theme of First Boston's brief is that it is entitled to immunity or a limitation on damages because of the special provisions for underwriters contained in Section 11 of the 1933 Act. That argument rests on a false premise. First Boston was *not* held liable under Section 11 for failing to discharge a duty of "due diligence." It was held liable under Section 14(e) because it knew from Bangor's minutes that BAR's value was inflated but elected to remain silent. Section 14(e) applies to "any person" making a misstatement in support of, or in opposition to a tender offer—a deliberately broad category, as shown by the legislative history.** Moreover, First Boston was not

* Indeed, in *CC III*, the district court specifically looked to the Second Circuit for instructions in setting the amount of interest to be awarded and recognized the authority of the court of appeals to fix such amount (B 79, n.24). Case law is in accord with this view. *Occidental Life Ins. Co.* v. *Pat Ryan & Assoc., Inc.*, 496 F.2d 1255, 1268-69 (4th Cir.), *cert. denied*, 419 U.S. 1023 (1974).

** The original draft of the Williams bill particularized the persons to be covered by Section 14(e)'s prohibitions. In early drafts,

(footnote continued on next page)

merely the dealer-manager for Bangor's offer; it was also the appraiser to assure the public that Bangor's exchange package was worth $80.

First Boston glosses over the significant differences between Section 11 of the 1933 Act and Section 14(e) of the 1934 Act. Section 11 imposes virtually absolute liability on underwriters for material misstatements in registration statements, unless the underwriter can satisfy the burden of proving that it acted without negligence. As a trade-off for imposing such strict liability, Section 11 contains special provisions for underwriters and others, such as a limitation on damages. This trade-off is reflected in the congressional history.* In contrast, defendants charged with violating Section 14(e) are not subject to the strict liability standards of Section 11, and the plaintiff has the burden of proving scienter. Thus, defendants who violate Section 14(e) are not entitled to Section 11's artificial limitations on liability. Here, the Second Circuit clearly distinguished between Sections 11 and 14(e) and held First Boston liable under Section 14(e) (A 51-55, 116-17; B 10).

Indeed, First Boston's arguments for Section 11 immunity in a Section 14(e) case were flatly rejected, not just

those circularizing or soliciting for or in opposition to an offer, as well as management, were covered. 112 Cong. Rec. 19,007 (Aug. 11, 1966) (SEC Memorandum); 113 Cong. Rec. 857 (Jan. 18, 1967). Ultimately, Congress chose the most inclusive language possible—that "any person" would be subject to 14(e)'s prohibitions. 113 Cong. Rec. 24,663 (Aug. 30, 1967).

* As to Section 11, *see* H. R. Rep. No. 85, 73d Cong., 1st Sess. 9-10 (1933); H. R. Rep. No. 152, 73d Cong., 1st Sess. 26 (1933) (Conference Report). As to Section 11(e) liability limitations added in 1934, *see* 78 Cong. Rec. 8669 (May 12, 1934); 78 Cong. Rec. 10,185 (June 1, 1934).

by the Second Circuit, but by Congress in passing the Williams Act. The investment banking community had urged that registered exchange offers be exempt from Section 14(e) and other provisions of the Williams Act because they were already covered by the 1933 Act. *Senate Hearings* at 112, 164. Chairman Cohen and others opposed this position. *See supra* at 70-71, n.**. As a result, Congress deleted the provision exempting registered exchange offers in the Senate version of Section 14(e). And the House and Senate Reports on Section 14(e) state that it applies to tender offers "whether for cash, securities or other consideration." S. Rep. No. 550, 90th Cong., 1st Sess. 11 (1967); H. R. Rep. No. 1711, 90th Cong., 2d Sess. 11 (1968).*

Long before the enactment of Section 14(e), it was settled that an underwriter guilty of violating one of the disclosure or antifraud provisions of the securities laws could not seek sanctuary in Section 11. That has been the law for a quarter of a century since the landmark opinion in *Fischman* v. *Raytheon Manufacturing Co.*, 188 F.2d 783 (2d Cir. 1951).** Indeed, during the

* The fact that Congress insisted that Section 14(e) should apply to exchange offers registered under the 1933 Act makes apt this Court's statement (about two other sections of the 1934 Act) in *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 468 (1969): "The two sections of the Act apply to different sets of situations . . . . The fact that there may well be some overlap is neither unusual nor unfortunate."

** In that opinion by Judge Frank, a former SEC Chairman, the Second Circuit held that where a fraudulent prospectus for preferred stock had the effect of misleading common stockholders, they had standing under the antifraud provisions of Section 10(b), and the defendant was not entitled to invoke the standing limitations of Section 11. Judge Frank declared: "Were this not true, Section 11

(footnote continued on next page)

trial of this case, First Boston itself espoused the *Fischman* rationale.*

Acceptance of First Boston's theory that an underwriter who sponsors a false prospectus in a control contest is immune under Section 11 would lead to anomalous results. A tenderor, management or investment banker issuing a false press release would be liable for full compensatory damages under Section 14(e); but an underwriter who promotes a false prospectus—a more important document —would be immune under Section 11. In effect, First Boston seeks to make bankers a privileged class. But the Second Circuit in its *Chris-Craft* opinions emphasized that the very stature of this underwriter gave it greater clout to cause harm because of public reliance on its prestigious name (A 50-51). That was particularly true here in view of First Boston's multiple roles as public appraiser for the

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of the 1933 Act, designed to protect investors even when there is no fraud, would afford a shelter or sanctuary for those who defraud investors." 188 F.2d at 787. The *Fischman* rule has been adopted in numerous cases involving Section 10(b) and other provisions of the securities laws. *See, e.g., Newman* v. *Prior*, 518 F.2d 97, 99 (4th Cir. 1975); *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F.2d 123, 125 & n.3 (7th Cir. 1972); *Donlon Indus., Inc.* v. *Forte*, 402 F.2d 935, 936 n.2 (2d Cir. 1968) (Friendly, J.); *McClure* v. *Borne Chemical Co.*, 292 F.2d 824, 836-37 (3d Cir.), *cert. denied*, 368 U.S. 939 (1961). Regarding damages, *see Grossman, Faber & Miller, P.A.* v. *Cable Funding Corp.*, [1974-75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶94,913, at 97,120-21 (D. Del. 1974); *Unicorn Field, Inc.* v. *Cannon Group, Inc.*, 60 F.D.R. 217, 226-27 (S.D.N.Y. 1973).

* "Chris-Craft . . . admits it is not entitled to sue under the 1933 Act. To have standing thereunder, a plaintiff must have purchased securities offered by the prospectus. The distinction between what must be proven under the 1934 Act as against the 1933 Act has long been recognized. In *Fishman* [sic] v. *Raytheon, supra*, Judge Frank laid down the rule that a plaintiff without standing under the 1933 Act must prove the additional element of fraud to recover under Rule 10b-5." First Boston Trial Memorandum at 19-20 (March 4, 1971).

Piper stockholders, and dealer-manager for Bangor. It had a major financial stake in the outcome of the contest.* First Boston was thus much more than an underwriter—a fact further discrediting its Section 11 defense.

Investment bankers and underwriters, like lawyers, accountants and ordinary citizens, have been held liable in many cases under the securities laws.** As Judge Friendly has stated:

> "In our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar." *United States* v. *Benjamin*, 328 F.2d 854, 863 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964).

Investment bankers can wield the same "chisel or crowbar."†

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* First Boston, contrary to its present assertion, Br. for First Boston at 53, had a substantial financial interest in the contest wholly apart from its fee as underwriter for Bangor's false prospectus. First Boston was also the paid investment adviser to the Pipers for almost a year. Bangor agreed to pay First Boston "an amount not yet determined" (EV 35) if it obtained control of Piper. Although never publicly revealed, the amount is of sufficient magnitude to warrant a separate notation in Bangor's and Piper's financials. *See, e.g.*, Bangor's Annual Report for 1973, EV 1026.

** Two investment bankers were held liable in far less extreme circumstances (and where they wore fewer hats) for failure to exercise independent judgment as to the value of inflated assets in *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255, 268 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972). *See also Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228 (2d Cir. 1974); *Globus* v. *Law Research Serv., Inc.*, 418 F.2d 1276, 1288-89 (2d Cir.), *cert. denied*, 397 U.S. 913 (1970); *Jordon Bldg. Corp.* v. *Doyle, O'Connor & Co.*, 401 F.2d 47 (7th Cir. 1968); *Dorfman* v. *First Boston Corp.*, 336 F. Supp. 1089 (E.D. Pa. 1972).

† First Boston's reliance on *Ultramares Corp.* v. *Touche*, 255 N.Y. 170 (1931), is misplaced. There, Judge Cardozo held that an auditor who endorsed an opinion of value he knew was false, or who acted with reckless disregard for the truth, would be liable to third parties for misrepresentation. *Id.* at 186, 190-91.

VII

PETITIONERS WERE PROPERLY HELD TO BE JOINTLY AND SEVERALLY LIABLE.

The Second Circuit held petitioners jointly and severally liable because "the conduct of each of the petitioners, through their violation of the securities laws, contributed to the success of BPC's takeover attempt" (A 69; B 4). Bangor, which was at the core of the violations, does not complain about this. But First Boston and the Piper insiders do. Br. for First Boston at 51-52; Br. for Piper at 39-46. They argue that they should not be jointly and severally liable and that, instead, damages should be apportioned according to each petitioner's relative culpability.

But it is hornbook law that individual tortfeasors whose combined misdeeds contribute to an indivisible injury (here, converting Chris-Craft's huge block from a commanding plurality into an unsalable minority) are jointly and severally liable, especially when they cooperated for nine months in a campaign against their victim. Thus, Dean Prosser states:

> "Where two or more causes combine to produce such a single result, incapable of any logical division, each may be a substantial factor in bringing about the loss, and if so, each must be charged with all of it . . . . The duties which are owed to the plaintiff by the defendants are separate, and may not be identical in character or scope, but entire liability rests upon the obvious fact that each has contributed to the single result, and that no rational division can be made."
> Prosser, *Law of Torts* 315-16 (4th ed. 1971) (footnote omitted).*

Prosser gives this example: if two defendants separately shoot a victim and he dies from the effect of both wounds, liability cannot logically be divided, and each defendant will be held liable for the whole loss. *Id.* at 314. Here, all petitioners shot at Chris-Craft and hit the bull's-eye.

The traditional rule discussed by Dean Prosser applies with equal force in the securities field, according to Professor Loss.**

The application of those principles is clearly correct here. The Piper insiders initiated the "scorched earth" campaign, issued fraudulent statements and recruited First Boston and Bangor. First Boston—involved at every critical juncture—delivered the final blow by concealing the BAR loss. Petitioners, all with a substantial stake in the

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* *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U.S. 476, 500-01 (1964); *Miller* v. *Union Pacific R.R.*, 290 U.S. 227, 236 (1933). *See also* 1 Harper & James, *The Law of Torts* §10.1, at 692-93, 697-98 (1956).

** "When a number of defendants have participated in a scheme that would have collapsed if any of the defendants had made the disclosure required by Rule 10b-5, there is no way to apportion guilt. Under these conditions, it is appropriate to apply the principle that each joint tortfeasor is liable for the full amount of damages. *Ross* v. *Licht*, 263 F. Supp. 395, 411 (S.D.N.Y. 1967), citing *Restatement of Torts* §§875-76." 6 Loss, *Securities Regulation* 3924 (Supp. 1969). *See also Gould* v. *American-Hawaiian S.S. Co.*, [1975-76 Transfer Binder] CCH Fed. Sec. L. Rep. ¶95,512, at 99,598 (3d Cir. 1976); *Myzel* v. *Fields*, 386 F.2d 718, 750 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968). Here, if First Boston had spoken out about BAR, it would have exposed the misrepresentation.

success of the campaign against Chris-Craft, are jointly and severally liable under conventional legal principles.*

Finally, the claim by the Piper insiders (Br. for Piper at 39) and First Boston (Br. for First Boston at 52) that damages should be apportioned is not properly raised before this Court. While the Pipers' pretrial brief in *CC III* stated that if damages were awarded "with all defendants jointly and severally liable," the trial court "at an appropriate stage thereafter . . . should determine the rights and liabilities of the defendants to each other,"** no petitioner ever pressed that request nor made cross-complaints against the other petitioners. The apportionment issue, not even litigated yet, is obviously not an appropriate matter for consideration by this Court. Petitioners, if they wish, are free to pursue a contribution proceeding,† where

* There is similarly no merit to the Pipers' alternative claim that they can escape liability because the other petitioners' acts were supervening causes which occurred several months after the Pipers' original violations. Br. for Piper at 26-35. The doctrine of intervening cause in the cases cited by the Pipers does not apply to these intentional misdeeds, because the Pipers brought the other wrongdoers into the plan against Chris-Craft and because the Pipers' fraudulent public statements had a continuing adverse impact on Chris-Craft throughout the contest (A 62). *See, e.g., Freeman* v. *United States,* 509 F.2d 626, 633-34 (6th Cir. 1975); *Lopez* v. *Southern Pacific Co.,* 499 F.2d 767, 772 (10th Cir. 1974); *Michael* v. *United States,* 338 F.2d 219, 220-21 (6th Cir. 1964).

** Feb. 28, 1974, at 2 n.

† "[T]he plaintiff's right to recover for his harm should not depend on his ability to apportion the damage [;] this is a problem which is properly left with the defendants themselves." 1 Harper & James, *The Law of Torts* §10.1, at 702; 3 Loss, *Securities Regulation* 1739-40, n.178 (2d ed. 1961). *See also* Douglas & Bates, *The Federal Securities Act of 1933,* 43 Yale L.J. 171, 178-79 (1933); *Gould* v. *American-Hawaiian S.S. Co.,* 387 F. Supp. 163 (D. Del. 1974), *mod.,* [1975-76 Transfer Binder] CCH Fed. Sec. L. Rep. ¶95,512 (3d Cir. 1976); *Globus, Inc.* v. *Law Research Ser., Inc.,* 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam,* 442 F.2d 1346 (2d Cir.), *cert. denied,* 404 U.S. 941 (1971).

each can seek to lay blame at the other's doorstep. But their victim's right to recover compensatory damages, already delayed for many years, should not be further postponed.

Conclusion

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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Nos. 75-353, 75-354, and 75-355

In the Supreme Court of the United States

OCTOBER TERM, 1976

HOWARD PIPER, ET AL., PETITIONERS

v.

CHRIS-CRAFT INDUSTRIES, INC., ET AL.

THE FIRST BOSTON CORPORATION, PETITIONER

v.

CHRIS-CRAFT INDUSTRIES, INC., ET AL.

BANGOR PUNTA CORPORATION, ET AL., PETITIONERS

v.

CHRIS-CRAFT INDUSTRIES, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-353

HOWARD PIPER, ET AL., PETITIONERS

v.

CHRIS-CRAFT INDUSTRIES, INC., ET AL.

No. 75-354

THE FIRST BOSTON CORPORATION, PETITIONER

v.

CHRIS-CRAFT INDUSTRIES, INC., ET AL.

No. 75-355

BANGOR PUNTA CORPORATION, ET AL., PETITIONERS

v.

CHRIS-CRAFT INDUSTRIES, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

The Securities and Exchange Commission files this brief, *amicus curiae*, to express its views on the effects the resolution of the questions addressed by the parties will have on the Commission's administration of the federal securities laws.

QUESTIONS ADDRESSED

The Securities and Exchange Commission will discuss the following specific questions: [1]

1. Whether a private right of action should be implied under Section 14(e) of the Securities Exchange Act on behalf of a competing tender offeror against those who made misleading statements during the course of a tender offer contest.

2. To what extent, and in accordance with what principles, should the relief to be granted in such an action be limited by either the express statutory language of Section 14(e) or the express limitations on liability imposed by the Securities Act of 1933.

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[1] We express no views concerning the numerous questions of fact presented by the parties herein. For example, we take no position regarding whether the violations claimed caused the injury complained of and whether that injury has properly been shown, how liability should be apportioned among the defendants, and whether the computation of damages by the court of appeals adequately compensated the respondent for its loss. Our concern, in sum, is with the proper principles to be applied to the questions that this case presents rather than with the manner in which the factual issues are resolved.

3. Whether Securities Exchange Act Rule 10b-6 is violated where a tender offeror engaged in a distribution of its own shares purchases securities which represent a right to purchase the shares which are the subject of the distribution, and, whether a private right of action exists to remedy such a violation of the Rule.

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission is responsible for the administration and enforcement of the Securities Exchange Act of 1934, of which the Williams Act and the rules thereunder are an important part. While the Commission has no specific interest in the precise outcome of the litigation between the parties before this Court, the issues presented involve the application and scope of private actions for violations of the Williams Act which, as this Court has observed with respect to comparable issues under the proxy provisions of the Securities Exchange Act, may have a profound effect on the Commission's ability to enforce the statutory obligations imposed by that Act, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

INTRODUCTION

This action arises out of a contest for corporate control of Piper Aircraft Corporation ("Piper"). As the target company, Piper management's first inclination was to stave off any change in control. Ulti-

mately, however, Piper was the subject of two competing tender offers. The first offer was inspired by external market forces and factors, and it was made by Chris-Craft Industries, Inc. ("Chris-Craft"). The second offer, made by Bangor Punta Corporation ("Bangor Punta"), was facilitated by First Boston Corporation ("First Boston"), Piper's financial adviser, and generated, apparently, by Piper management's concern, and that of the Piper family, that the inexorable destruction of Piper's independent corporate status (started by Chris-Craft's offer) should, at the least, occur at the hands of a suitor which was aided, comforted, materially assisted by, and thus, beholden to, Piper's management.

In the seven years since this litigation commenced, it has become a textbook classic on the broadranging issues and interests both raised and affected by the device of a contested tender offer, and has served as a model for the courts and practitioners alike in establishing and resolving the obligations and responsibilities of participants in tender offers. The practical lessons to be learned from court decisions like the three rendered in the court below cannot be overstated. For, as a respected textbook on security analysis has noted, "Wall Street has never paid much attention to theoretical thinking." Graham, Dodd & Cottle, *Security Analysis: Principles and Technique* 408 (4th ed., 1962).

Accordingly, and "for whatever reasons, * * * the present day's continuing saga of corporate warfare has brought before this Court what may appro-

priately be termed an epic battle." [2] Chris-Craft, the loser in the struggle for control of Piper, has been the winner in the litigation that ensued. Bangor Punta, the victorious combatant, was found to have violated the federal securities laws in winning corporate control of Piper and has been a loser in this litigation. The Piper family and First Boston, the allies of Piper and Bangor Punta, also found that being on the victorious side did not necessarily ward off extensive liability for the violations of federal law that facilitated Bangor Punta's successful campaign.

SUMMARY OF DISCUSSION

1. In 1968, one year before the events in issue here first commenced, Congress enacted the Williams Act [3]—comprehensive and pervasive legislation vesting in the Securities and Exchange Commission ("Commission") broad rulemaking authority to establish normative standards of conduct to govern the rights and obligations of the participants in, and those persons affected by, tender offers.

Prior to 1968, there was little regulation of tender offers. The Securities Act of 1933 did require registration of securities offered in tender offers which involved exchanges of securities, but did not apply to

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[2] *Copperweld Corp.* v. *Imetal*, 403 F. Supp. 579, 583 (W.D. Pa., 1975).

[3] Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454.

cash tender offers. Neither state statutes nor the common law provided effective relief. Thus, tender offer campaigns were waged without substantial regulation or control and often without regard to fairness, the accuracy of the information provided to security holders, or the orderliness of the securities markets. This was in sharp contrast to the comprehensive federal regulation of proxy contests, where rules had been adopted by the Commission pursuant to authority it had had since 1934 under Section 14(a) of the Securities Exchange Act. Those rules were designed to implement the congressional intent to protect against "promiscuous solicitation of * * * proxies, on the one hand, by irresponsible outsiders seeking to wrest control of a corporation away from honest and conscientious corporation officials; and, on the other hand, by unscrupulous corporate officials seeking to retain control of the management by concealing and distorting the facts." [4]

The Williams Act was designed to regulate tender offers and remedy the significant abuses that had developed. The secrecy in which the takeover process was enshrouded, the lack of adequate disclosure and antifraud requirements, and the pressure on each person affected by the process to act hastily without adequate information were all matters of concern to the Congress. And, the Congress found that the contestants sometimes engaged in other tactics that un-

[4] S. Rep. No. 1455, 73rd Cong., 2d Sess. 77 (1934).

dermined the confidence of the public in the integrity of the securities markets, including actual market manipulation.

The Williams Act, accordingly, was drafted to fill the regulatory gap by establishing a comprehensive scheme of regulation comparable to that which governed proxy contests. Congress noted that tender offers were "typically alternatives to proxy solicitations, as methods of capturing or preserving control," [5] and patterned the protections afforded by the Williams Act on the existing proxy regulation provisions of the Securities Exchange Act.

The antifraud provisions of the Williams Act were applied to all securities without regard to registration, and Congress substantially wrote into the law with respect to tender offer contests the Commission's broad proxy and antifraud rules. Section 14(e) of the Williams Act, for example, specifically bars any person from engaging in manipulative acts or practices.

The legislative history of the Williams Act shows that Congress intended to protect all persons interested in, or affected by, tender offers. While stressing

[5] Senate Committee on Banking and Currency, *Hearings Before the Subcommittee on Securities on S. 510*, 90th Cong., 1st Sess. 16, 33 (1967) (hereinafter "Senate Hearings").

the need to protect the shareholders of the target corporation, the legislative history shows that Congress was also concerned with the need to protect and to place on an equal footing all participants in the marketplace, including those who make the tender offers, those who oppose them, the target company's current stockholders, and potential investors. All of them were not only to have available all material information, but also the assurance that the contest would be fair. Care was taken to provide an equal opportunity both to the insurgents and to the entrenched to "avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." [6] In short, it was deemed as important as protecting management against unfair raiding attempts that incumbent management should not have the ability to "frustrate an attractive and desirable tender offer." [7]

2. The Williams Act creates the same "pervasive legislative scheme governing the relationship between * * *" the broad range of persons interested in, and interests affected by, tender offerors as this Court repeatedly has found to exist in the area of proxy regulation. *Cort* v. *Ash*, 422 U.S. 66, 82 (1975); *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964). In *Borak*, this Court found that the need, justification and authority for implied remedies under the Securities

[6] S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968).

[7] Senate Hearings, pp. 184, 186.

Exchange Act is "clear," 377 U.S. at 430. The appropriateness of implying private remedies stems in part from Section 27 of the Act which, as *Borak* pointed out, "specifically grants the appropriate district courts jurisdiction over 'all suits in equity and actions at law to enforce any liability or duty created under the Act.' " *Id.*, at 430-431. It stems as well from the long accepted concept that a person for whose benefit a statute was enacted should have a remedy for a violation by which he has been injured. On that basis, standing should be accorded to defeated offerors who seek to vindicate the requirements and provisions of the Williams Act.

But, even if this Court's decision in *Borak* were not dispositive of the appropriateness of implying private remedies for thwarted tender offerors, the four factors this Court recently specified in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), as "relevant" in "determining whether a private remedy is implicit in a statute not expressly providing one * * *," militate in favor of implying a private remedy here.

The first factor specified in *Cort* v. *Ash* is that the plaintiff be " 'one of the class for whose *especial* benefit the statute was enacted,' * * * that is, [that] the statute grant a federal right in favor of the plaintiff." [8] This depends upon whether there is "generally" either (1) a "pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard," or (2)

[8] *Cort* v. *Ash*, 422 U.S. 66, 78 (1975) (emphasis in original).

"a clearly articulated federal right in the plaintiff." *Id.*, at 82. A tender offeror seeking to enforce a violation arising under Section 14(e) meets both of these tests. The Williams Act provides sweeping protections for the contestants in a take-over battle, including tender offerors, as well as for the shareholders of the target corporation. Thus, Section 14(e) provides protections against what the Commission described as

> "dissemination of inaccurate *or* incomplete information *or* fraudulent acts *or* practices by persons who make or invite tender offers *and* [to] affor[d] a more practical means of preventing inaccurate *or* incomplete presentations *or* fraudulent acts *or* practices by persons opposing or favoring such tender offers".[9]

The "clearly articulated federal right in the plaintiff" [10] is created by the Williams Act in favor of each of the participants in a contest for control including tender offerors. Just as after *Borak*, the courts have concluded that a proxy contestant has "a genuine interest" [11] in assuring that its efforts would not be thwarted by the "prohibited" conduct of a rival, so here a tender offeror has an equally "genuine interest" in assuring that its success is not blocked by

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[9] 112 Cong. Rec. 19003 (1966) (emphasis supplied).

[10] 422 U.S. at 82.

[11] *Union Pacific Railroad Co.* v. *Chicago and North Western Railway Co.*, 226 F.Supp. 400, 406 (N.D. Ill., 1964).

violations of the Williams Act. Certainly the specific references in favor of tender offerors in Sections 14(d)(4) and 14(e) of the Act—establishing requirements of fairness and honesty for persons opposing tender offers—support the ample evidence of a Congressional intent to protect tender offerors.

A second relevant factor that has been employed by this Court to imply a cause of action, as set forth in *Cort*, is whether there is "any indication of legislative intent, explicit or implicit, either to grant such a remedy or deny one." [12] This Court there pointed out, 422 U.S. at 82 (emphasis in original), that:

> "in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such [a] cause of action would be controlling."

Not only is there no legislative history that can be cited as evidencing "an explicit purpose to deny" [13] a cause of action to participants in tender offers, but the legislative history of the Williams Act indicates that Congress was aware of the need for such private remedies, and that, in enacting the broad and inclusive proscriptions of Section 14(e), comparable to language in the Commission's proxy rules, Congress was aware that such language had been the basis for implying private actions on behalf of the

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[12] *Cort* v. *Ash*, *supra*, 422 U.S. at 82.

[13] *Id.*, at 78.

various persons participating in, or affected by, proxy contests.

A third test set forth in *Cort* is whether it is "consistent with the underlying purposes of the legislative scheme to imply * * * a remedy for the plaintiff." [14] In *Borak*, this Court emphasized that a private right of action was a necessary supplement to Commission action to make effective the Congressional purposes of the proxy provisions. Even more necessary are such private rights of action to supplement Commission actions to effectuate the Congressional purposes in enacting the Williams Act.

The number of tender offers has been rapidly increasing, and the economic, business and methodological complexities of tender offers need closer attention than even the most vigilant government agency can hope to provide within the brief time of a contested tender offer. Proxy statements must be submitted for staff review and comment before a formal "filing" is made, but the Williams Act provides no opportunity for the Commission to examine materials before requests or invitations for tenders are made to offerees, and the contest can be won or lost within a matter of days. In view of the extreme care employed by Congress to avoid tipping the scales in favor of either side, only where there are flagrant violations is the Commission likely to bring court action against one side or the other, since this in itself might tend to be an important consideration to the stockholders solic-

[14] *Id.*

ited. Moreover, rarely is the Commission in a position to take court action before it is not already too late to "unscramble the eggs." [15] On the other hand, the contestants who have a significant economic stake in the manner in which the contest is conducted also have the greatest "incentive to detect violations and vigorously pursue remedies," [16] all in furtherance of the purposes of the Act.

In *Borak*, 377 U.S. at 433, this Court pointed to the "duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional 'purpose,' " and struck down artificial barriers that might have interfered with meaningful relief. In light of *Borak* and subsequent cases implying causes of action under the proxy rules for all participants in proxy contests, the courts have similarly implied causes of actions under the Williams Act for all participants in tender offers—the target company's shareholders, the target company and competing tender offerors.

A fourth and final relevant factor set forth in *Cort* is whether the cause of action is one "traditionally relegated to state law, in an area basically the concern of States, so that it would be inappropriate to infer a cause of action based solely on federal law." [17]

[15] *Sonesta International Hotel Corp.* v. *Wellington Assoc.*, 483 F.2d 247, 250 (C.A. 2, 1973).

[16] *H. K. Porter Co., Inc.* v. *Nicholson File Co.*, 482 F.2d 421, 424 (C.A. 1, 1973).

[17] *Cort* v. *Ash, supra,* 422 U.S. at 78.

The Williams Act, as this Court held was true of the proxy provisions involved in *Borak*, is "clearly an intrusion of federal law into the internal affairs of corporations * * *" and the affairs of those seeking to engage in contests of corporate control. *Cort* v. *Ash*, 422 U.S. at 85. Committing a tender offeror to state-provided remedies, if any, "might well prove insuperable to effective relief." *Cf.*, *Borak*, *supra*, 377 U.S. at 434-435. State laws are often inconsistent with the purposes of the Williams Act. The jurisdictional scope for state actions may be too narrow to be effective. Procedural protections in state courts for the tender offeror are more imaginary than real. State remedies are generally inadequate. The real policy behind some state statutes appears to be to perpetuate local management and to induce incorporation in those states rather than risking tender offers which may lead to the ousting of management. Hence, even more than with respect to the proxy violations, it is entirely inappropriate to relegate tender offerors to state laws where the Williams Act has been violated by their opponents.

3. Over the last thirty years, the federal courts, encouraged by the decisions of this Court, consistently have implied private actions for those whom the federal securities laws were "designed to protect." [18] Of late, however, the utilization of private remedies to satisfy damages sustained as a result of illegal conduct has caused this Court to consider whether, and

[18] *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 396 (1970).

to what extent, limitations should be imposed on implied private actions. That consideration has led this Court to conclude that, just as the federal courts may imply federal remedies under the federal securities laws, so too may they imply limitations on those remedies.

But, since implied private actions under the federal securities laws "vindicat[e] the statutory policy * * *," and provide "an important means of enforcement of the * * *" statute, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 396 (1970), "resolving doubts in favor of those the statute is designed to protect * * *" shows that the strong public policy considerations supporting the implication of private actions under the federal securities laws should only be balanced against competing policy considerations of equal strength.

Such an analysis suggests that limitations on implied private remedies should be "consistent with the legislative scheme" [19] and should not impede or frustrate the purposes which the statutory provisions involved, and the private remedy implied thereunder, seek to effectuate. Similarly, in giving content to the Congressional policies in the Act, implied private remedies should be delimited in a manner consistent with the express language of the provision of the Act

[19] *Rondeau* v. *Mosinee Paper Co.*, 422 U.S. 49, 62 (1975); *Cort* v. *Ash*, *supra*, 422 U.S. at 78; *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458-461 (1974); *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 423-424 (1975).

pursuant to which a private action has been implied. Where neither the express language nor the Congressional intent underlying the sections of the Act involved give clear guidance, limitations imposed on implied private actions should conform to the "bounds [Congress] delineated for *comparable* express causes of action." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 736 (1975) (emphasis supplied).

These principles have their most important application in assessing the relief to be granted in a private suit, once a violation of the law has been established. To effectuate the purposes of the Act, the manner in which damages are calculated should both implement the statutory scheme, and not cause undue disruption in the methods by which those persons who are regulated under the Act carry out their normal business activities. Thus, if damages are denied in the face of truly violative conduct, or are otherwise inadequate where real injury has been suffered, so as to diminish the likelihood that bona fide private lawsuits will be brought, or conversely, if damages are computed in a Draconian fashion, the Congressional purposes underlying the federal securities laws will not be effectuated.

In the instant case, the Commission, as a government agency, is concerned solely with the principles applied in arriving at an award of damages, not the amount of damages that may in fact be awarded. The Commission must rely on private parties to "supplement" its own enforcement of the federal securities laws, and the performance of this function is

assured if damages are awarded in an amount sufficient to compensate an injured party for the full extent of its loss caused by the defendants. Of course, where the Commission institutes its own enforcement action, its success in obtaining remedies ancillary to the award of an injunction should be considered by the courts to determine whether the judgment obtained by the Commission can restore private party plaintiffs to their status quo ante, or otherwise make them whole for any injury suffered. In such a case, the award of damages to a prevailing plaintiff would be inappropriate.

Section 14(e) of the Securities Exchange Act proscribes misleading, as well as fraudulent, statements in connection with tender offers, and does not present the Court with a statute designed solely to proscribe knowing violations of the law. Instead, Section 14(e), like Rules 10b-5 and 14a-9, after which it was patterned, should be "read as proscribing * * * any type of material misstatement or omission, and any course of conduct, that has the effect of defrauding investors, whether the wrongdoing was intentional or not." *Cf. Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. 1375, 1390 (1976). But, persons injured solely by virtue of merely negligent conduct in derrogation of Section 14(e), particularly if that conduct should occur in connection with misleading statements in a registration statement, should be compensated by analogy to the remedies expressly provided in the Securities Act for misleading statements in the sale of securities. On the other hand, the public policy in

restoring injured parties to their prior status is greater where they are the victims of knowing wrongdoing. In such a circumstance, they should be compensated for their actual damages, including all those sustained as a consequence of the defendants' wrongdoing. See, *e.g.*, *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 155 (1972); *Janigan* v. *Taylor*, 344 F. 2d 781, 786 (C.A. 1), *certiorari denied*, 382 U.S. 879 (1965).

4. "The very heart of the [Securities Exchange] Act" [20] is its proscriptions against manipulative devices. Those proscriptions, contained in part in Sections 9(a) and 10(b) of the Act, were enacted in 1934, to counteract the broad abuses Congress had seen in its intensive study of stock market practices. Many of the manipulative practices Congress isolated and identified served "no legitimate function," [21] except the unjust enrichment of the perpetrators of such acts, and thus were "specifically prohibited"; [22] in other areas, however, Congress recognized that "so delicate a mechanism as the modern stock exchange cannot be regulated efficiently under a rigid statutory program," [23] and granted the Commission "discre-

[20] Securities and Exchange Commission, *Report on Proposals for Amendments of the Securities Act of 1933 and the Securities Exchange Act of 1934*, H.R. Comm. Print, 77th Cong., 1st Sess. 50 (1941).

[21] S. Rep. 792, 73d Cong., 2d Sess. 7 (1934).

[22] *Id.*

[23] *Id.*, at p. 5.

tionary and elastic" [24] powers to assure that those trading activities not improper in and of themselves, but carrying the potential for adverse manipulative consequences, would be employed under carefully circumscribed conditions subject to monitoring by the Commission.

One rule adopted by the Commission to fulfill this latter function was Securities Exchange Act Rule 10b-6. It governs and proscribes efforts by persons distributing securities to the public to bid in the open market for either the same securities, or other securities convertible into the securities being distributed. "The rationale [of the Rule] is that a potential purchaser of the securities being distributed should not be induced into buying them because of abnormal market pressures driving the price up through secret purchases by the issuer or [its] underwriters." [25]

Particularly in situations involving competing tender offers, anxious offerors, desirous of defeating their competitors, have an incentive to engage in transactions in violation of Rule 10b-6 in the hope of increasing the market price for the target company's securities to a price just below their own bid, but above the competing tender offer bid. Similarly, by publicly announcing the acquisition of shares so obtained, they hope to stampede undecided investors in a close contest into tendering shares hastily, in the

[24] *Id.*

[25] Binder, *The Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569, 666 (1973).

belief that the violator's tender offer is the one that will succeed, and the public will be denied an opportunity to participate unless they tender immediately. Either or both these consequences are undesirable, disrupt the orderliness of the securities markets, and are within the proscriptions of Rule 10b-6.

Once such violative conduct is demonstrated, any person actually injured by a violation of Rule 10b-6 should be accorded standing to pursue a private remedy. Such an action may be implied under generally accepted judicial decisions, but more properly should be recognized as one of several express remedies granted by Section 9(e) of the Securities Exchange Act, a section of the Act which embodies "an overall congressional intent to prevent 'manipulative and deceptive practices which fulfill no useful function' and * * * create[s] private actions for damages stemming from 'illicit practices,' where the defendant has not acted in good faith." *Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. at 1386-1387.

DISCUSSION

I. IN ADOPTING THE WILLIAMS ACT IN 1968, CONGRESS INTENDED TO PROVIDE A COMPREHENSIVE SCHEME OF FEDERAL REGULATION FOR ALL TENDER OFFERS, AND TO CREATE FEDERAL RIGHTS FOR, AND OBLIGATIONS UPON, ALL PERSONS PARTICIPATING IN, OR DIRECTLY AFFECTED BY, CASH AND EXCHANGE TENDER OFFERS.

While this case may present an "epic battle" for this Court to resolve, it also presents the specific implementation of strategies, weapons and procedures

employed in tender offers generally ever since those seeking corporate control commenced utilizing modern tender offer techniques in 1920.[26] Those techniques, as well as those who employed them or were affected by them, were at the core of the Congressional realization in 1968, and again in 1970, that pervasive federal regulation of tender offers was a necessary component of the basic legislative enactments of the Congress in 1934, which were designed, among other things, to regulate and control "inequitable and unfair practices on [securities] exchanges and [the over-the-counter] markets * * *,"[27] and "to impose requirements necessary to make such regulation and control reasonably complete and effective * * *."[28] Accordingly, a recognition of the dynamics of the tender offer phenomenon, the motivations of the Congress in seeking to regulate it, and the results of that Congressional effort—the Williams Act—must precede any disposition of the issues raised by this case.

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[26] Austin, *Tender Offers Revisted*, 8 Mergers & Acquisitions 16, 17 (Fall, 1973).

[27] Section 2 of the Securities Exchange Act, 15 U.S.C. 78b, 48 Stat. 818.

[28] *Id.*

Through "the general policy declarations of Congress in * * *" statutory provisions such as Section 2 of the Securities Exchange Act, "a veritable code of rules reveals itself * * * to follow in giving effect to the standards of * * *" the Act. *Cf., e.g., American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 105 (1946); *Yakus* v. *United States*, 321 U.S. 414, 419-427 (1944); *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 24-25 (1932); *Intermountain Rate Cases*, 234 U.S. 476 (1914).

A. The Dynamics of Tender Offers: The Contest For Control

1. *The emergence of the tender offer*

Prior to 1968, tender offers were unregulated. Although used as a device to obtain corporate control since 1920,[29] they were largely a foreign development.[30] American competition for corporate control had traditionally been waged through proxy contests, a form of corporate combat pervasively regulated by the federal gvernment since 1934.[31]

By 1968, however, former Commission Chairman Manual F. Cohen, in his preface to Aranow & Einhorn's classic treatise on proxy contests for corporate control, felt constrained to comment on an untoward and emerging trend in the takeover rage—a substantial equivalent to the familiar proxy fight[32]—of considerable concern and significance to the Commission, corporate managers, investors, securities market professionals and their advisors:

> "One of the most striking phenomena on the corporate scene in recent years has been the large

[29] Austin, *Tender Offers Revisited,* 8 Mergers & Acquisitions 16, 17 (Fall, 1973).

[30] See, *e.g.,* Aranow & Einhorn, *Proxy Contests for Corporate Control* 585-586 (2d ed., 1968).

[31] *Id.,* at xiii.

[32] See, *e.g.,* Fleischer & Mundheim, *Corporate Acquisition by Tender Offer,* 115 U. Pa. L. Rev. 317, 320-323 (1967); Hamilton, *Some Reflections on Cash Tender Offer Legislation,* 15 N.Y.L.F. 269, 293-301 (1969); Bromberg, *The Securities Law of Tender Offers,* 15 N.Y.L.F. 459, 471-472 (1969).

> number of mergers and other forms of acquisitions—particularly mergers and acquisitions involving companies in different fields. Informed observers have stated that they consider the merger proxy statements prepared under the Commission's Proxy Rules to be the most useful and informative documents available in evaluating today's "conglomerate" companies. But in the very recent past, the situation has been getting away from us. Statutory mergers and proxy contests, traditional means of acquiring control of a publicly held corporation, are being supplanted to an increasing degree by cash purchases either through tender offers or through private or open market purchases.[33]

"Tender offers," the process by which existing shareholders are solicited to tender their shares to the offering or bidding individual, group or corporation, have become an increasingly popular[34] and effective[35] method of obtaining control of publicly-

[33] Aranow & Einhorn, *Proxy Contests for Corporate Control,* xvii (2d ed., 1968).

[34] See Senate Committee on Banking, Housing and Urban Affairs, *Hearings on Corporate Takeovers,* 94th Cong., 2d Sess. 1 (1976). A more precise analysis of this development appears at pp. 25-26, of this brief. See also, Note, *Cash Tender Offers,* 83 Harv. L. Rev. 377 (1969); Note. *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934,* 86 Harv. L. Rev. 1250, 1253 (1973).

[35] See Note, *The Regulation of Corporate Tender Offers under Federal Securities Law: A New Challenge for Rule 10b-5,* 33 U. Chi. L. Rev. 359 (1966); Note, *The Williams Amendments: An Evaluation of the Early Returns,* 23 Vand. L. Rev. 700-704 (1970).

held "target" companies.[36]

The offer is normally extended for a limited and specified period of time, and the offeror's obligation actually to purchase or "take down" the securities "tendered" usually is contingent upon its ability to acquire all or a specified number of the target's securities within that time frame. The offer may be for cash, for an exchange of the offering company's securities, or a combination of both cash and securities.

The complexities involved in the practical application of tender offer principles are compounded by the fact that the ingenuity of those involved on both sides of a contested tender offer is boundless.[37] While tender offerors may, and often feel they must, proceed cunningly and aggressively in their efforts to secure control of "target" companies, they are frequently opposed with equal vigor by the existing managements of those "targets." Indeed, the ferocity of the resulting conflict is often such that it has been likened to nonviolent economic war.[38]

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[36] Although tender offers do not automatically encompass attainment of control as their purpose, the offer is seldom content to be mere stockholders in the target company. Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. Pa. L. Rev. 317, 318 (1967).

[37] See, *e.g.*, House of Representatives Committee on Interstate and Foreign Commerce, *Hearings Before the Subcommittee on Commerce and Finance on H.R. 14475, S. 510*, 90th Cong., 2d Sess. 22 (1968) (hereinafter cited as "House Hearings").

[38] 116 *Cong. Rec.* 29252 (1970) (Remarks of Senator Williams); Manne, *Cash Tender Offers for Shares—A Reply to Chairman Cohen*, 1967 Duke L.J. 231, 236 (1967); *Ruthlessness by the Rules*, 117 *Forbes* 24, 25 (Feb. 1, 1976); Blair & Co., *The Strategy of Tender Solicitation* (1967); Austin & Fishman, *Corporations in Conflict—The Tender Offer*, 119 (1970); Austin, *Tender Offer Statistics*, 10 Mergers & Acquisitions 9, 13 (Fall, 1975); Cary, *Corporations* 1633 (4th ed., 1969). Schmults & Kelley, *Cash Takeover Bids—Defensive Tactics*, 23 Bus. Law. 115 (1967).

In recent years, the use of the tender offer as a means of seeking control has increased:[39] for example, the number of tender offer notices and reports on solicitations and recommendations by persons other than the offeror filed with the Commission in fiscal year 1975, was treble the number of similar reports filed in fiscal 1971.[40] This virtual explosion in tender offers has dwarfed by comparison the number of proxy contests waged in the same time frame.[41] The

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[39] See Hayes & Taussig, *Tactics of Cash Takeover Bids*, 45 Harv. Bus. Rev. 135 (Mar.-Apr., 1967), for "the only reasonably complete list of cash and stock tender offers made in the United States between January 1, 1956 and December 31, 1966." *Id.* at 148. Two similar studies of the growth of tender offers from 1956 to 1975 were later conducted by Dr. Donald V. Austin, Chairman of the Department of Finance, College of Business Administration of the University of Toledo. Austin, *Tender Offers Revisited*, 8 Mergers & Acquisitions 16, 17 (Fall, 1973); Austin, *Tender Offer Statistics*, 10 Mergers & Acquisitions 9 (Fall, 1975).

[40] Compare Securities and Exchange Commission, *37th Annual Report* 56 (1971), with Securities and Exchange Commission, *41st Annual Report* 51 (1975).

[41] The Commission's records disclose that proxy contests have not substantially varied in the last eight fiscal years, averaging approximately 24 per year. In approximately the same time span, the number of tender offers has increased significantly—three-fold, from 34 in fiscal year 1970 to 107 for fiscal year 1976.

ratio of tender offers to proxy contests increased during this time period from about 1.5:1 to almost 5:1, and the aggregate amount of cash or principal amount of securities offered in exchange for target securities plus brokerage commissions has increased almost nine times in the same period—from approximately $299 million in fiscal year 1971, to over $2.6 billion in fiscal year 1975.[42]

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[42] These figures were compiled by the Commission's Office of Tender Offers, Acquisitions, and Small Issues.

Various factors appear to have contributed to the increased utilization of tender offers, rather than proxy contests, as a vehicle for gaining corporate control. The overall increase in the use of the tender offer has been attributed by some commentators to such factors as: increased corporate liquidity and readily available credit; comparatively depressed price/earnings ratios, book values, and cash or quick assets ratios, making acquisition via the tender offer more attractive; greater recognition, sophistication, and knowledge with respect to the takeover by tender offer; lack of extensive federal or state regulation of tender offers; quicker and more successful results when compared with a full-dress proxy contest; greater flexibility—the ability to hedge by reserving certain options against a final and irrevocable commitment; psychology—the appeal to shareholders in straight dollars and cents language, eliminating the need, as in a proxy contest, to convince the shareholder that the insurgent can do a more efficient job; and a new "respectability" for cash tender offers. Aranow & Einhorn, *Tender Offers for Corporate Control* 65-66 (1973). See also, Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. Pa. L. Rev. 317, 317-323 (1967); Hamilton, *Some Reflections on Cash Tender Offer Legislation*, 15 N.Y.L.F. 269, 269-275 (1969). Cohen, *Tender Offers and Takeover Bids*, 23 Bus. Law. 611 (1968).

2. *The participants*

The offeror—and those in competition with it—the target company, incumbent management, market professionals, and the allies of each, all have vital economic interests in the outcome of the contest for corporate control. In this case, the role of three participants—the offeror, the target company, and the dealer-manager—are paramount, and the techniques they employ, as well as the techniques employed by the arbitrageurs who are critical to the success of tender offers, are discussed—although not condoned where violative of the federal securities laws—below.

a. *The offeror*

For a tender offeror, the stakes—majority control—are high: to the victor goes the spoils, including the right to hire and set salaries, to negotiate contracts and even to liquidate the corporation. And, while such powers, if abused, may subject insurgent management to a shareholder suit,[43] "judges are not business experts," [44] and the courts often give those in power a wide range of discretion.[45]

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[43] See, *e.g.*, *Ross* v. *Bernard*, 396 U.S. 531 (1970).

[44] *Dodge* v. *Ford Motor Co.*, 204 Mich. 459, 465, 170 N.W. 668, 684 (1919).

[45] See, Israels, *The Sacred Cow of Corporate Existence: Problems of Deadlock and Dissolution*, 19 U. Chi. L. Rev. 778 (1952) and Manne, *Cash Tender Offers for Shares—A Reply to Chairman Cohen*, 1967 Duke L. J. 231, 242-243 (1967); Conard, *Corporations in Perspective* 199 (1976).

Professors Brudney and Chirelstein have noted that:

Once an offeror's initial analysis of a target company is concluded, a strike force is assembled to conduct the battle for control.[46] Since the incumbent management may employ "a variety of defensive measures that are successful in direct proportion to the speed of their execution," [47] secrecy is essential to assume the advantage of surprise and thereby to minimize the time available for incumbent management to prepare and execute its defense.[48] As one

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"It is extremely difficult to prove that management's judgment has been tainted by self-interest, or that expectations of personal gain have led to price concessions at the stockholder's expense. Employment arrangements apparently entered into by parties dealing with each other at arm's length are hard to challenge on their own terms, especially when the parties are prepared to testify in support of the honest character of their undertakings."

Brudney, & Chirelstein, *Fair Shares in Corporate Mergers and Takeovers,* 88 Harv. L. Rev. 297, 343 (1974).

[46] A small internal team of legal, accounting, public relations and executive officers with the capacity and authority to act quickly will direct the effort. Augmenting management's own resources will be a dealer-manager, soliciting agent, outside counsel, independent accountant, depository bank, forwarding agent and printer. 1 Flom, Lipton & Steinberger, *Takeovers and Takeouts—Tender Offers and Going Private* 10-11 (Law Jl. Pr., 1976). See also *Takeover Bids: Proceedings of Meeting Held in Lloyd's Writing Room, London on Tuesday, 20 July 1971,* 27 Bus. Law. 243, 259-263 (1971).

[47] Hayes & Taussig, *Tactics of Cash Takeover Bids,* 45 Harv. Bus. Rev. 135, 139 (1967).

[48] A tender offer is typically made for a value in excess of the market price; when the offer is disclosed, the market price invariably increases. Accordingly, secrecy about a possi-

commentator has noted, "The most important thing in this business is to keep your mouth shut. Acquisitions are made in dark rooms and strange places." [49]

An offeror will often need large sums to effect a successful takeover. To minimize the outlay of cash, some corporations offer to exchange their own shares,

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ble takeover may also enable the offeror, through anonymous open market purchases, to acquire a number of shares at a lower price, resulting in substantial savings to the offeror which can later be employed to purchase additional shares. Pre-offer purchases, moreover, enable the offeror to get a feel for the market and the best tender price, as well as to develop a position in the target's securities that can be used to "soften management * * * and deter other bidders." 1 Flom, Lipton & Steinberger, *Takeovers and Takeouts—Tender Offers and Going Private* 10 (Law Jl. Pr., 1976). Since heavy buying on the market can drive up the market price of shares, however, "[k]nowing when to stop buying on the open market is (also) an important element in the bidder's strategy." Hayes & Taussig, *supra,* 45 Harv. Bus. Rev. at 139.

[49] *Financial Post,* January 10, 1970 at 10, Col. 2, also quoted in Anisman, *Takeover Bid Legislation in Canada,* (1974).

or warrants, for shares in the target company. The use of newly created warrants and notes—so-called "funny money"—to accomplish a takeover was prevalent in the late 1960's,[50] but has not kept pace in the 1970's with the explosion of tender offers generally. In other instances, corporations use cash from their own reserves or third party financing.[51]

Timing must be considered from two vantage points: first, the offeror must determine the length of time within which it wishes to extend its offer; and, second, the offeror must decide the date on which the offer will be made. A sufficient amount of time must be provided to allow shareholders to become acquainted with and accept the tender offer; but too much time will allow existing management the opportunity to muster its defenses successfully.[52] Mon-

[50] See Hamilton, *Some Reflections on Cash Tender Offer Legislation*, 15 N.Y.L.F. 269, 295 (1973); *Wall St. J.*, Feb. 26, 1969 at p. 3, Col. 2.

[51] While an offeror may borrow against its own existing assets, it is also possible to use the target company's assets effectively to refinance the takeover by collateralizing a loan to buy control with the target's securities previously purchased quietly in the open market. "Arranging this kind of loan is just like a corporation getting a line of credit, except that this loan cannot be drawn down unless the deal goes through." *The Takeover Titans*, 85 Finance 8, 12 (Aug. 1967). "[L]ike most lines of credit arrangements, the bank is usually promised the company's account when the new boys take over." *Ibid.*

[52] The exact time period of the intitial tender offer varies with the needs of the offeror. A recent survey of notable cash tender offers in 1975 and early 1976 has indicated that 10 to 14 days is the usual length of time between the announcement

day mornings are considered to be the ideal selection date, since five full trading days follow, without providing management any nontrading weekends in which to consolidate its defense.[53]

Once preparations are completed and the offer extended, the twin burdens of planning and defensive action shift to the target company's management and its allies. If there is a pre-arranged cooperative agreement with the offeror for some type of merger, very little activity on the part of the target's management is necessary. However, if management realizes that it will be displaced or the corporation is to be liquidated, a persistent struggle often ensues.

b. *The target*

A target may erect a number of obstacles to discourage a tender attack not yet made, but anticipated:

> "Only the limits of one's imagination restrict the host of measures possible. The corporate constitution may be fashioned to dilute the voting power of a successful takeover bidder or to make it impossible for the bidder to carry out the objective of the takeover. A freezing period on franchises, an increased special majority for

of the initial tender offer and its termination. Of course, the offeror always has the option of extending the time period as often as he wishes, "and offers are usually extended at least once." Troubh, *Purchased Affection: A Primer on Cash Tender Offers*, 54 Harv. Bus. Rev. 79, 80, 82-83 (Jul.-Aug., 1976).

[53] Austin & Fishman, *Corporations in Conflict: The Tender Offer* 119 (1970).

mergers into a takeover bidder, and classifying or staggering the board, if allowed in the jurisdiction, fall into this category. The incumbents may equip themselves with service contracts that would make their dismissal costly. Contracts with a wide variety of interests may also discourage takeovers by imposing burdens on the corporation in the event of a change of management. Labor contracts may provide for a wage increase, rent contracts may raise the rent or provide for renegotiation, and lending contracts may call for acceleration." [54]

Once the tender offer is made, however, existing management of the target usually communicates with the target's shareholders, initiating a public campaign to convince them that the offer is not in their best interests or those of the corporation.[55] Related

[54] Yoran, *Advanced Defensive Tactics Against Takeover Bids*, 21 Am. J. Comp. L. 531, 534 (1973).

[55] Fleischer & Mundheim, *supra*, 115 U. Pa. L. Rev. at 321. If management can effectively style the communication as being in the corporation's (as opposed to management's) best interest, the resources of the corporation may be used to finance the distribution of that information to its shareholders. *Id.* The communication may also appeal to stockholder loyalty to the company.

> "The problem with this type of defensive tactic is that most shareholders do not feel any special allegiance to the companies whose shares they own. This is perhaps even more so in the case of institutional shareholders where they are given a clear and relatively riskless opportunity to realize immediate profit."

5 Securities and Exchange Commission, *Report of the Institutional Investors Study*, H.R. Doc. No. 92-64, 92d Cong. 1st

corporate actions to keep existing shareholders in management's camp may also serve to chill the bidder's pursuit. Management, for example, may: raise dividends, which has the side effect of depleting corporate assets and making the corporation a less desirable target; effect a stock split, which may increase the value of each shareholder's portion of the target company,[56] while at the same time increasing brokerage expenses involved in acquiring the target securities; and refuse to disclose its stockholders list.[57]

Taking the offensive, the target may initiate litigation seeking a permanent or temporary injunction against the takeover. Such action, even if unsuccessful, will often serve to buy additional time for management to consolidate its counter-attack.[58] In an attempt to lessen the number of shares available on the market, the target may enter the market place

Sess. 2839 (1971). This is not to imply that shareholder loyalty can never be effective. See, *e.g.*, *The Takeover Titans*, 85 Finance 8, 13 (Aug., 1967).

[56] Hayes & Taussig, *Tactics of Cash Takeover Bids*, 45 Harv. Bus. Rev. 135, 143 (1967). But compare, Schmults & Kelley, *Cash Takeover Bids, Defense Tactics*, 23 Bus. Law. 115, 118 (1967).

[57] But see proposed Securities Exchange Act Rule 14e-1, Securities Act Release No. 5731 (Aug. 2, 1976).

[58] Lee, *Tender Offer Defense, How to Short Circuit the Corporate Raider*, 10 Mergers & Acquisitions 4, 5 (Fall, 1975). Some companies, in an effort to stop a takeover, will go to extremes to create a litigable issue. See, *e.g.*, *Ruthlessness by the Rules*, 117 Forbes 24, 26 (Feb. 1, 1976).

to purchase its own securities.[59] Such action can have "the double effect of driving the market price of the stock above the bid * * *," and thus defeating the offer[60] and may make the target liable for a violation of the federal securities laws. The target's management, often with the assistance of its investment banker, may also actively seek a merger with another corporation more to management's liking[61] —more of a lesser-of-the-evils approach than a solution.[62]

Innumerable other approaches are employed by management.[63] Regardless of the defense or defenses chosen, however, speed is essential. To be effective, the response must come within hours, not days.[64]

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[59] Schmults & Kelley, *supra*, 23 Bus. Law. at 124.

[60] Hayes & Taussig, *supra*, 45 Harv. Bus. Rev. at 193.

[61] Austin & Fishman, *Corporations in Conflict: The Tender Offer* 135 (1970).

[62] See Aranow & Einhorn, *Tender Offers for Corporate Control* 256 (1973).

[63] See, *e.g.*, Taussig and Hayes, *Are Cash Take-Over Bids Unethical?* Financial Analysts J. 107 (Jan.-Feb. 1967); Bromberg, *Tender Offers: Safeguards and Restraints—An Interest Analysis*, 21 Case W. Res. L. Rev. 613 (1970); Brown, *Corporate Defenses to Takeover Bids*, 44 Tul. L. Rev. 517 (1970); Cary, *Corporate Devices Used to Insulate Management from Attack*, 25 Bus. Law. 339 (1970).

[64] Austin & Fishman, *Corporations in Conflict: The Tender Offer* 127 (1970).

c. *The arbitrageur*

Stimulated market activity inevitably follows the announcement of a tender offer, since the offer is typically made at a premium over market. Other purchasers, particularly the professional risk arbitrageur, then seek to join the offeror in purchasing the target's securities. Without these arbitrageurs, "there [would be] no tender offer as we know it today."[65] In fact, it has been estimated that arbitrageurs are responsible for over half of all shares ultimately tendered[66] and that they may be responsible for up to 90 percent of trading involved in an uncontested exchange offer.[67]

The arbitrageur functions as an intermediary between the offeror and the shareholder. By purchasing shares from the holder at a price between the current market value and the price of the tender offer, the arbitrageur assumes the risk that the tender offer will not be consummated, or that all the shares tendered will not be accepted, and, at the

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[65] Senate Committee on Banking, Housing and Urban Affairs, *Hearings on Corporate Takeovers*, 94th Cong., 2d Sess. 60 (1976).

[66] O'Boyle, *Changing Tactics in Tender Offers*, 25 Bus. Law. 863, 866 (1970).

[67] *Huge Profits Out of Tiny Margins*, Bus. Week, May 28, 1966 at 116.

same time, seeks the reward of additional profits if the shares he holds are ultimately purchased.[68]

The role of the arbitrageur is an important one for the offeror. The arbitrageur's willingness to participate in the market is dependent upon his ability to turn over the securities he purchases quickly, to prevent being caught with an unwanted position for which he has paid a premium over market. By rapidly buying and simultaneously selling, the arbitrageur discourages shareholders from holding out for a higher price.[69] For the offeror, "every share tendered at a low price makes final acquistion that much cheaper." [70] Offerors have, therefore, been advised to encourage arbitrage by offering a good premium, limiting the conditions of the offer, offering a generous soliciting dealer's fee, and periodically checking the quantity of tenders received.[71] As one commentator expressed it:

> "We evolve the strategy to incur the total sympathy and cooperation and participation of two

[68] See generally, Aranow & Einhorn, *Tender Offers for Corporate Control* 173-191 (1973).

[69] The technique described above has a number of more sophisticated variations. See, *e.g.*, Evans, *Arbitrage in Domestic Securities in the United States* (1965); Henry, *Activities of Arbitrageurs in Tender Offers*, 119 U. Pa. L. Rev. 466 (1971); Baer & Sifka, *Does Arbitrage Create Institutional Opportunities?* 1 Institutional Investor 24 (Apr., 1967).

[70] *Ruthlessness by the Rules*, 117 Forbes 24, 25 (Feb. 1, 1976).

[71] Aranow & Einhorn, *Tender Offers for Corporate Control* 191 (1973).

> groups: our own private army of customers' men who we are going to bribe [by offering them a fee for every share of stock they induce investors to tender], and the arbitrageurs. We try to make as fail-safe a deal for them as we can so their risk is minimized, so they will be motivated to buy the stock, and by the time they get their hands on the stock they only have one goal in mind, to convert it back to cash." [72]

Since the arbitrageur's profit is largely dependent upon the success of the offer, as soon as it appears that a tender offer may fail, the arbitrageur will quickly liquidate his position. The arbitrageur's activity in simultaneously buying and selling the same security serves to reduce the price differential, and the arbitrageur's refusal to participate (or withdrawal) serves to maintain the discrepancy between the offered price and market price. A steady price movement and a gradual narrowing of the price spread, therefore, tends to indicate to sophisticated investors that arbitrageurs believe the tender offer will be successful. A stable or increased price differential, on the other hand, may indicate that the arbitrageur is skeptical about the ultimate success of the offer.[73]

[72] Senate Committee on Banking, Housing and Urban Affairs, *Hearings on Corporate Takeovers*, 94th Cong., 2d Sess. 60 (1976).

[73] Henry, *Activities of Arbitrageurs in Tender Offers*, 119 U. Pa. L. Rev. 466, 470 (1971).

d. *The dealer-manager*

The "dealer-manager," often referred to as the "investment banker" of the offeror or competing offeror,[74] functions as the chief assistant to the offeror in the planning and execution of the campaign. "His principal function is as an advisor to the issuer on policy and tactics, including disclosure questions, in planning the offer and in preparing the offering documents." [75] In the battle for control, he is the "acknowledged general" [76] who has the responsibility for pushing the project to completion:

> "[He] organizes, structures, evaluates, and coordinates the deal. Usually the most experienced person in the group, he is expected to prepare the agenda, check lists, time schedules, and similar guidelines as well as to recommend to the client the names of appropriate lawyers, depositary banks, soliciting agents, printers, and advertising agents. His stature must be such that it inspires confidence in the investment community (particularly in the arbitrageurs) that the tender offer will actually succeed." [77]

In addition to his obligation of soliciting and organizing other broker-dealers, he is expected to make recommendations as to the premium necessary for an effective tender offer, the contingencies of the offer

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[74] See Troubh, *Purchased Affection: A Primer on Cash Tender Offers*, 54 Harv. Bus. Rev. 79, 87 (Jul.-Aug., 1976).

[75] Mundheim, et al., ed., *Sixth Annual Institute on Securities Regulation* 83 (P.L.I., 1975).

[76] Troubh, *supra*, 54 Harv. Bus. Rev. at 84.

[77] *Ibid.*

and the fees to be paid the solicting dealers.[78] Unlike underwriters of securities offerings, the dealer-manager's obligation does not encompass personal buying and selling; rather it relates primarily to structuring the deal, soliciting stockholders, and organizing other broker-dealers to solicit tenders.

Because the dealer-manager is part of the pretender offer planning process, he has access to privileged inside information and, therefore, may not participate in the market prior to the announcement.[79] After the announcement, he also acts as an agent for the offeror and must, therefore, limit his purchases to that contained in the tender offer.[80]

The dealer-manager's fee may be a flat sum or a "per-share" commission or a flat sum and an "override" fee on each share tendered. If the dealer-manager acts as a soliciting dealer,[81] he will be paid additionally for each share he personally solicits.[82]

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[78] *Id.*, at 79-87.

[79] *Cf., Securities and Exchange Commission* v. *Healy*, 74 C-4305 (S.D. N.Y., 1974), SEC Litigation Rel. No. 6589 (Nov. 18, 1974; *Securities and Exchange Commission* v. *Sorg Printing Co.*, CCH Fed. Sec. L. Rep. ¶ 95,034 (S.D. N.Y., 1975).

[80] See 17 CFR 240.10b-13.

[81] The soliciting dealer is a broker-dealer who is paid a fee for each share of stock he induces investors to tender.

[82] "The fee to soliciting brokers generally approximates 2% of the purchase price of the tendered stock or 125% to 175% of a New York Stock Exchange commission on an equivalent Big Board Transaction." Troubh, *supra*, 54 Harv. Bus. Rev. at 86.

In addition to its fee, the typical agreement between the offeror and the dealer-manager contains a provision for reimbursement of the dealer-manager's expenses—including indemnification for any liability connected with the offer.[83] Unlike underwriters, whose fees are usually based on the number of securities to be issued and, in a firm commitment underwriting, purchased by him, a dealer-manager is often compensated quite handsomely even though he neither assures the success of the offer nor assumes the risks of a purchaser.[84]

The dealer-manager may, in the accomplishment of his goal, assume some of the characteristics of a mere underwriter, but those characteristics are only coincidental; his role, as general and tactician in an exchange tender offer, encompasses much more than the mere distribution of the offeror's shares and his total reimbursement usually reflects this difference.[85] Nor are these unimportant distinctions, particularly for the scope of the dealer-manager's ultimate liability for his actions. As one commentator recently noted:

> "The major difference between the underwriters' liability in a normal "firm" underwritten public offering and an exchange offer is that the dealer-

[83] Mundheim, et al., ed., *Sixth Annual Institute on Securities Regulation* 85 (P.L.I., 1975).

[84] "[F]ees of $500,000 to $1,000,000 are not unheard of in large tender-offers." Troubh, *supra*, 54 Harv. Bus. Rev. at 86.

[85] Troubh, *Purchased Affection: A Primer on Cash Tender Offers*, 54 Harv. Bus. Rev. 79, 84-89 (Jul.-Aug., 1976).

> manager in the exchange offer is potentially liable as sort of a 'super underwriter' for the entire package. In the typical Securities Act registration situation, the underwriting agreement is between the issuer and each of the underwriters severally, and the managing underwriter receives his management fee from the other participating underwriters. Therefore, within the statutory framework of Section 11 (e) of the Securities Act, the managing underwriter does not receive from the issuer any benefit that all other underwriters do not receive and he is not liable for more than the price at which he, the managing underwriter, sold his securities.
>
> "In the exchange offer, however, the dealer-manager receives a fee that the soliciting dealers do not receive, and, consequently, the benefits afforded by Section 11(e) would not be applicable and the dealer-manager would be liable for the full amount of the offering, subject to his right under Section 11(f) to receive contributions from other persons found liable under Section 11." [86]

[86] Mundheim, et al., ed. *Sixth Annual Institute on Securities Regulation* 88-89 (P.L.I., 1975).

B. Prior to the Adoption of the Williams Act, Tender Offers Were Virtually Unregulated, in Contrast to the Comprehensive Federal Regulation of Proxies and Proxy Contests.

Before the Williams Act,[87] few controls existed over tender offers. The states had not been governing tender offers,[88] and existing federal law had only peripheral application to them.[89] In those instances where the tender offer took the form of an exchange of shares—in essence, a sale of the offeror's stock—the transaction was subject to the disclosure requirements of the Securities Act of 1933.[90] However, that

[87] The Williams Act added new Sections 13(d), 13(e), 14(d)(e) and 14(f) to the Securities Exchange Act of 1934. Act of July 29, 1968, P.L. No. 90-439, 82 Stat. 454 (codified at 15 U.S.C. 78m(d)-(e), 78n(d)-(f) (1970).

[88] Only one State, Virginia, had, by that time, even passed a statute regulating tender offers—that statute was enacted in March 1968, just four months prior to the Williams Act. Va. Code Ann. § 13.1-528, eff. Mar. 5, 1968 (3 CCH Blue Sky Law Rep. ¶ 49,228).

[89] See Fleischer & Mundheim, *Corporate Acquisition By Tender Offer*, 115 U. Pa. L. Rev. 317, 328-349 (1967); Note, *The Regulation of Corporate Tender Offers Under Federal Securities Laws: A New Challenge For Rule 10b-5*, 33 U. Chi. L. Rev. 359, 373-376 (1966); Binder, *The Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569, 572-610 (1973).

[90] See S. Rep. No. 550, 90th Cong., 1st Sess. 2-3 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 3 (1968). See also Bromberg, *The Securities Law of Tender Offers*, 15 N.Y.L.F. 462 (1969); Hamilton, *Some Relections on Cash Tender Offer Legislation*, 15 N.Y.L.F. 269, 273-274 (1969); Note, *Cash Tender Offers*, 83 Harv. L. Rev. 377, 379 (1969); Note, *The Developing Meaning of "Tender Offer" Under the Securities*

Act was not applicable when only cash, rather than an exchange of securities was involved.[91] Nor was it clear that a tender offeror was an "insider" for the purpose of imposing disclosure obligations under Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder with respect to its future plans for the target company or material information concerning the issuer's affairs prior to its becoming a controlling shareholder.[92] And the disclosure requirements were felt by some not to apply to the activities of persons who opposed tender offers.[93]

Act of 1934, 86 Harv. L. Rev. 1250, 1254 (1973); Note, *The Williams Amendments: An Evaluation of the Early Returns*, 23 Vand. L. Rev. 700, 702 (1970).

[91] See Hayes & Taussig, *Tactics of Cash Takeover Bids*, 45 Harv. Bus. Rev. 135, 137 (Mar.-Apr., 1967); Bromberg, *supra*, 15 N.Y.L.F. at 462-463; Hamilton, *supra*, 15 N.Y.L.F. 273-275; Note, *supra*, 86 Harv. L. Rev. at 1253-1254; Note, *supra*, 83 Harv. L. Rev. at 377-381; Note, *supra*, 23 Vand. L. Rev. at 700-704; Binder, *supra*, 18 N.Y.L.F. at 610.

[92] See, *e.g.*, *Mills* v. *Sarjem Corp.*, 133 F. Supp. 753 (D. N.J., 1955); Senate Hearings, pp. 143, 183; House Hearings, p. 59. For a discussion of the role of Section 10(b) and Rule 10b-5 in the setting of tender offers prior to adoption of the Williams Act, see Binder, *supra*, 18 N.Y.L.F. at 572-599; Note, *Current Problems Under the Securities Acts—The Expanding Use of Rule 10b-5*, 10 B.C. Ind. & Com'l. Rev. 313, 328-334 (1969). Loss, *The Role of Rule 10b-5 in Tender Offers*, Securities Regulation and Transfer Report (Special Report, Jan., 1969).

[93] Senate Hearings, p. 28; House Hearings, pp. 18, 59.

At common law, a person selling a controlling interest in a corporation, in certain instances, might be liable under the so-called corporate asset theory [94] and, if he delivered immediate control, had to be reasonably sure that the buyer was not intent upon looting the corporate treasury; [95] but that was the extent of common law restrictions on persons cooperating with tender offerors.[96]

There were few, if any, effective controls on the conduct of persons opposing tender offers, as well. As the court below surmised (A. 30), the common law recognized the tortious nature of a deliberate, unreasonable, interference in an economic relationship or prospective advantage, and thus imposed liability for such deliberate actions as the circulation of a malicious misstatement involving some disparagement of a plaintiff's property, business or person.[97] Conceivably, incumbent management might be liable at common law for circulating a false statement about an offeror in an effort to overcome a takeover bid, but only if it could be shown that management had acted intentionally and maliciously, had deliberately lied, and had intended to cause the specific injury actually suffered.[98] And, even then, the cause of action was so limited that it presented no viable remedy even for deliberate conduct in the tender offer context.[99] Thus, prior state law regulated

[94] See, *e.g.*, *Perlman* v. *Feldman*, 219 F.2d 713 (C.A. 2), *certiorari denied*, 349 U.S. 952 (1955). See also, Jennings, *Trading in Corporate Control*, 44 Cal. L. Rev. 1 (1956); Leech, *Transactions in Corporate Control*, 104 U. Pa. L. Rev. 725 (1956); Hill, *The Sale of Controlling Shares*, 70 Harv. L. Rev. 986 (1957).

[95] See, *e.g.*, *Insuranceshares Corp.* v. *Northern Fiscal Corp.*, 35 F. Supp. 22 (E.D. Pa., 1940) and the discussions thereof appearing in Notes, 19 Chi. Kent L. Rev. 193 (1941); 26 Cornell L. Q. 325 (1941); 54 Harv. L. Rev. 648 (1941); 25 Minn. L. Rev. 335 (1941); 27 Va. L. Rev. 546 (1941). See also, *Gerdes* v. *Reynolds*, 28 N.Y.S. 2d 622 (Sup. Ct., 1941); *Swinney* v. *Keebler Co.*, 329 F. Supp. 216 (S.D. Cal., 1971), *reversed* 480 F.2d 573 (C.A. 4, 1973); *Levy* v. *Fernberg*, 29 N.Y.S. 2d 550 (Sup. Ct., 1941); *Dale* v. *Temple Co.*, 186 Tenn. 69, 208 S.W. 2d 344 (1948).

[96] Austin & Fishman, *Corporations in Conflict* 25-34 (1970); Kennedy, *Tender Moment*, 23 Bus. Law. 1091, 1094 (1968).

[97] See Prosser, *The Law of Torts*, 919-969 (4th ed., 1971); Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. Pa. L. Rev. 317, 321 (1967); Halpern, *Intentional Torts and the Restatement*, 7 Buff. L. Rev. 7 (1952).

[98] Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. Pa. L. Rev. 317, 321 (1967). And see, *Peffer* v. *Bennett*, 523 F. 2d 1323, 1325 (C.A. 10, 1975); *Susskind* v. *IPCO Hospital Supply Corp.*, 373 N.Y.S. 2d 627, 629 (App. Div., 1975); *Wegman* v. *Dairylea Corp., Inc.*, 376 N.Y.S. 2d 728, 735 (App. Div., 1975); *Leonard Duckworth, Inc.* v. *Michael L. Field & Co.*, 516 F. 2d 952, 957 (C.A. 5, 1975); *Glenn* v. *Point Park College*, 272 A. 2d 895, 899 (Pa., 1971); *Philips Chemical Co.* v. *Hulbert*, 301 F. 2d 747, 750 (C.A. 5, 1962); *DeSantis* v. *City of Troy*, 371 N.Y.S. 2d 310, 315 (Sup. Ct., Rens. Cty, 1975); *Hiers* v. *Cohen*, 329 A. 2d 609, 612 (Conn., 1973); *Martin* v. *Philips Petroleum Co.*, 445 S.W. 2d 429, 435 (Ct. of Civ. App. of Tex., 1970).

[99] See American Law Institute, *Restatement of Torts 2d*, Sec. 768 (Tent. Draft No. 14, 1969); 1 Harper & James, *The Law of Torts* 474-481 (1950); Prosser, *The Law of Torts* 955 (4th ed., 1971); *Middlesex Concrete, etc.* v. *Carteret Indus. Ass'n.*, 181 A.2d 774, 781 (N.J., 1962).

the takeover process only indirectly, with virtually no restrictions on the takeover bid itself.[100] For example, management, in opposing a tender offer with corporate funds or purchasing shares of the corporation to thwart the offeror, merely had to be careful not to give the appearance of acting in its own self-interest; but, self-interest is difficult to prove, and therefore such activities by management were generally upheld.[101]

In short, in the absence of an occasional temporary restraining order for a violation of state libel and

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[100] State law provided some safeguards for the improper use of corporate assets to defeat the takeover bid, see, *e.g.*, *Condec Corp.* v. *Lunkenheimer Corp.*, 43 Del. Ch. 353, 220 A. 2d 769 (1967), but none to the use of corporate assets in making a takeover bid. Such use could always be justified on the basis of the business judgment rule. See *Casey* v. *Woodruff*, 49 N.Y.S. 2d 625, 642 (Spec. Terms, N.Y. Co. 1944), cited with approval in *Otis & Co.* v. *Pennsylvania R. Co.*, 61 F. Supp. 905 (E.D. Pa., 1945), *affirmed*, 155 F. 2d 522 (C.A. 3, 1946).

[101] See *Cheff* v. *Mathes*, 41 Del. Ch. 494, 199 A.2d 548 (1964); *Kors* v. *Carey*, 39 Del. Ch. 47, 158 A.2d 136 (1960); *Martin* v. *American Potash Chem. Corp.*, 33 Del. Ch. 234, 92 A.2d 295 (1952). See also, Senate Hearings, p. 121. Israels, *Corporate Purchases of Its Own Shares—Are There New Overtones*, 50 Cornell L. Q. 620 (1965).

federal fraud laws—to the extent applicable[102]—tender offer campaigns could be waged fast and furiously, without regulation or control, and without regard to the fairness, honesty and orderliness of the securities markets.

This absence of regulation of tender offers was in sharp contrast to the comprehensive federal regulation of the more traditional means of capturing control of corporations—the proxy contest. In 1934, Congress, in Section 14(a) of the Securities Exchange Act, 15 U.S.C. 78n(a), had granted the Commission sweeping authority to adopt rules to regulate and control proxy solicitations. Indeed, the wide scope of the Commission's authority under Section 14(a) is reflected in the statutory standard that the Commission's rules be "necessary or appropriate *in the public interest* or for the protection of investors" (emphasis added)[103]—a standard which contemplates the protection not only of investors but also of others involved in, or affected by the contest.[104] As the Senate Report on Stock Exchange Practices noted:

> "It is contemplated that the rules and regulations promulgated by the Commission will protect investors from promiscuous solicitation of their proxies, on the one hand, by irresponsible outsiders seeking to wrest control of a corporation away from honest and conscientious cor-

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[102] House Hearings, pp. 18, 59; Senate Hearings, p. 210.

[103] See Senate Hearings, p. 191.

[104] See pp. 69-74, *infra*.

poration officials; and, on the other hand, by unscrupulous corporate officials seeking to retain control of the management by concealing and distorting facts." [105]

The Commission, without attempting to affect control or interfere in the strategy of participants in a proxy contest,[106] evolved pervasive rules which reflect one of "the major accomplishments flowing from the 1934 Act for the benefit of the investing public and the market place generally." [107] As one commentator has stated: "The proxy rules are very likely the most effective disclosure device in the SEC scheme of things." [108]

C. Regulation of Tender offers was Needed Because Significant Abuses Had Developed.

As a result of the regulatory vacuum existing prior to the Williams Act with respect to tender offers, a number of abuses had developed—abuses which were harmful to *all* the various participants in a tender offer contest.

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[105] S. Rep. No. 1455, 73d Cong., 2d Sess. 77 (1934).

[106] Senate Committee on Banking and Currency, *Hearings Before a Subcommittee on S. 876,* 84th Cong., 1st Sess. 1695, 1696 (1956) (Remarks of former Commission Chairman Armstrong).

[107] House Committee on Interstate and Foreign Commerce, *Hearings on H.R. 6789, H.R. 6793, S. 1642,* 88th Cong., 1st & 2d Sess. 165 (1964).

[108] 2 Loss, *Securities Regulation* 1027 (2d ed., 1961).

A major abuse—found to threaten public confidence in securities as a medium of investment [109] and the integrity of the marketplace itself [110]—was the secrecy with which the process was enshrouded. Senator Kuchel, a co-sponsor of the Williams Act, lamented the futile position of both management and shareholders, uninformed and caught within the "tragedy" of the "rape" of the target by corporate raiders acting under a "cloak of secrecy".[111] The problem was compounded by the combatants' dissemination of "a rash of charges and counter charges" [112] —neither clearly subject to existing disclosure requirements nor susceptible to control under existing antifraud provisions [113]—variously characterized dur-

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[109] S. Rep. No. 550, 90th Cong., 1st Sess. 2 (1967), ("Senate Report"), H.R. Rep. No. 1711, 90th Cong., 2d Sess. 3 (1968) ("House Report").

[110] Speech by Chairman Cohen before the Association of the Bar of the City of New York, April 14, 1967, reprinted at Senate Hearings, p. 203. Citing the "drastic effects" of secret takeover bids on the price of the target's securities, it was noted in the Senate record:

> "In these circumstances trading is characterized by rumor, by speculation and by fear, characteristics which are hardly conducive to public confidence in the securities markets."

See also, Senate Hearings, pp. 2, 42-43, 48, 49, 52.

[111] Senate Hearings, p. 43.

[112] Senate Hearings, pp. 19, 35.

[113] *Id.*

ing the Senate Hearings as containing "inaccurate," [114] "overly enthusiastic promising statements," [115] and as having "quite a bit of puff in them." [116]

Referring specifically to abuses by management in opposing a tender offer, then Commission Chairman Cohen emphasized:

> "If management does oppose the offer, the present lack of regulation leaves it with powerful weapons, which it may wield with impunity, provided its activities fall short of fraud.[117] Management tactics may include making all sorts of predictions and extravagant claims * * *" [118]

Another abuse involved the "undue pressure on shareholders to act hastily and to accept the offer, before *management or any other group* has an opportunity to present opposing arguments or competing offers." [119] The Congress was told that offers,

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[114] Senate Hearings, p. 31. Section 14(e) was conceived by its drafters as preventing "inaccurate or incomplete" presentations. See 112 Cong. Rec. 19003 (1966) and discussion, *infra*, pp. 64-69.

[115] Senate Hearings, p. 125.

[116] Senate Hearings, p. 159.

[117] Moreover, Chairman Cohen also cautioned the Congress:

> "A majority of the district courts which have considered the question have concluded that the antifraud provisions of the Securities Exchange Act do not apply because the misleading announcement was not issued 'in connection with' trading in securities by the corporation."

House Hearings, p. 59.

[118] Senate Hearings, p. 196. See also, Senate Hearings, pp. 19, 31, 35, 38, 178; House Hearings, pp. 13, 18.

[119] Senate Hearings, pp. 21, 35 (emphasis supplied).

made at a premium over market, were announced under conditions creating the impression that a "hasty deposit" was required to participate in a transaction structured on a "first-come, first-served basis." [120] Those who succumbed were predictably deprived of taking advantage of "later and better offers, either from the same or a different source." [121] And, Congress was cautioned that insurgents were not the sole offenders—there existed a similar need to stem the pressure exerted by "management or others in opposition to a tender offer" through legislation "which would make it more difficult to frighten shareholders into refusing a tender offer on the basis of unsubstantiated or irrelevant arguments." [122]

Finally, tender offerors, target managements and their allies were found to have engaged in manipulative conduct as an integral part of their offensive and defensive strategies. The activities of desperate target managements, funded by corporate treasuries, and assisted by "friendly" [123] "outsiders who went into the market and purchased shares with the implicit purpose of driving up the price of the shares and therefore making the tender offer bid look un-

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[120] Senate Hearings, p. 17. See also, House Hearings, p. 16.

[121] Senate Hearings, p. 17.

[122] Speech by Chairman Cohen before Association of the Bar of the City of New York, April 14, 1967, reprinted at Senate Hearings, pp. 202, 204-205.

[123] Senate Hearings, p. 60.

attractive to investors," [124] were of particular concern:

> "Management * * * may go into the market using corporate funds to buy stock for the purpose of frustrating the tender offer, either by reducing the supply available for tender, or by pushing up the price, or both." [125]

And, to further complicate matters and confuse the marketplace, while target managements and their allies were "arranging bids or purchases to raise the market so as to defeat the tender offer," tender offerors were "arranging offers or sales * * * in order to make the tender offer attractive." [126]

D. In Passing the Williams Act, Congress Intended to Fill the Regulatory Gap by Enacting a Comprehensive Scheme of Regulation Comparable to That Which Governed Proxy Contests.

In seeking to remedy the abuses in the tender offer area, Congress was acutely aware of the obvious parallel between tender offers and proxy contests [127] and that many of the same practical problems of providing shareholders with a balanced presentation existed: [128]

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[124] Senate Hearings, p. 62. See also, Senate Hearings, p. 236.

[125] Senate Hearings, p. 196. See also, Senate Hearings, pp. 3, 27.

[126] Senate Hearings, p. 131 (as to target managements and tender offerors); *id.*, at pp. 60, 62, 236 (as to "allies").

[127] Senate Hearings, p. 206.

[128] *Id.* See also, Senate Hearings, pp. 180-181.

> "[A]cquisitions of blocks of voting securities are typically alternatives to proxy solicitations, as methods of capturing or preserving control. In either case there is involved a form of industrial warfare in which the stakes are high, and two or more groups are attempting to manipulate the public security holder to their own advantage." [129]

Congress recognized that the protections ultimately afforded by the Williams Act were patterned on the existing proxy regulation provisions of the federal securities laws [130] and designed to permit the Commission to exercise the same sort of control over the process.[131] Broad rulemaking authority was granted to the Commission to make effective the statutory scheme and, in the cases of contested or competing tender offers, to prevent "high pressure appeals and procedures possible when no restraints, other than the anti-fraud provisions of the securities laws, relate to those activities." [132]

In short, as Chairman Cohen explained, the Williams Act would "fill a gap, a rather large gap in the securities statutes": [133]

> "The procedures provided by the bill in the case of contested tender offers are analogous to those

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[129] Senate Hearings, pp. 16, 33; House Hearings, p. 11.

[130] 113 Cong. Rec. 24664 (1967).

[131] Senate Hearings, p. 206.

[132] Senate Hearings, p. 20.

[133] Senate Hearings, pp. 20-21.

now followed when contending factions solicit proxies under the Commission's proxy rules."

Congressional recognition of the similarity of approach between enforcement of the Williams Act and enforcement of the proxy regulations—particularly with respect to implied private rights of action—was reflected in the references to this Court's landmark decision in *J. I. Case Co.* v. *Borak, supra*, upholding implied private rights of action for damages under the proxy rules. Professor Carlos Israels, a prominent commentator on the securities laws, in discussing the enforcement of the bill's provisions and giving an example of a situation in which a private action would lie, stated:

> "Presumably we may assume that the Commission will be able to enforce the provisions of this Bill * * * and of its rules thereunder by proceedings for injunction in the Federal courts; and that under J. I. Case Co. v. Borak, 377 U.S. 426 (1964) a private litigant could seek similar relief before or after the significant fact such as the acceptance of his tender of securities." [134]

E. The Williams Act Provides a Pervasive Scheme of Federal Regulation of Tender Offers.

The Williams Act, as finally adopted, embodies the Congressional response to a significant area of previously unregulated securities activity affecting the

[134] Senate Hearings, p. 67. See also, Senate Hearings, p. 140.

control of publicly-held corporations. Its provisions reflect the results of Congress's attempts to resolve the market problems attributable to tender offers and the tactics used in opposing them, as described above, and to establish standards of normative conduct for all participants in, or persons affected by, tender offers, without tipping the scales in favor either of incumbent management and its allies, or in favor of insurgent groups seeking to persuade existing shareholders and the marketplace that a change in control of the target of the takeover bid, and, perhaps, a change in its management, would be desirable.

The legislation, as originally introduced in 1965, had the somewhat limited objective of protecting target corporations and their shareholders from the activities of "corporate raiders".[135] Subsequently, the bill was dramatically revised, and, as finally enacted, it was intended to provide comprehensive and even-handed protection to all participants in the tender offer process.

Senator Williams' original tender offer legislative proposal was S. 2731, introduced by him in October, 1965. Although in introducing that bill he expressed broad concern about "orderly and honest markets," [136] his main emphasis was upon imposing new obligations and duties upon persons making tender offers:

[135] 111 Cong. Rec. 28258, 28259 (1965).

[136] 111 Cong. Rec. 28258 (1965); see also, Senate Hearings, p. 132.

> "In recent years we have seen proud old companies reduced to corporate shells after white-collar pirates have seized control with funds from sources which are unknown in many cases, then sold or traded away the best assets, later to split up most of the loot among themselves * * *.
>
> "The ultimate responsibility for preventing this kind of industrial sabotage lies with the management and the shareholders of the corporation that is so threatened. But the leniency of our laws places management and shareholders at a distinct disadvantage in coming to grips with the enemy." [137]

The provisions of S. 2731 were viewed as working "to the disadvantage of any corporate takeover specialists who could not stand the full glare of a public spotlight." [138] S. 2731 would have attacked takeover problems from the bill's limited perspective in essentially three ways. To protect the target company, it would have (1) amended the reporting of insider transaction provisions of Section 16 of the Securities Exchange Act; [139] and (2) imposed advance disclosure and filing requirements on persons making cash tender offers and certain other acquisitions of securi-

[137] 111 Cong. Rec. 28257-28259 (1965).

[138] 111 Cong. Rec. 28258 (1965).

[139] The amendment to Section 16 would have had the effect of subjecting tender offerors and persons associated with them to the reporting and short-swing profit liability provisions in certain situations for the first time; the beneficiary of the expanded short-swing liability would have been the target corporation.

ties.[140] A third feature of the bill—the grant of rule-making authority to the Commission to impose requirements with respect to purchases by corporations of their own securities [141]—would have assisted tender offerors.

Subsequent to the introduction of S. 2731, the Commission submitted extensive comments on that bill to Senator Williams, together with a proposed revision of the bill embodying the changes which the Commission suggested.[142] This led to the introduction by Senator Williams in 1967 of S. 510, which was essentially the Commission's proposed revision.[143]

The Commission's suggested changes, together with additional changes added during the hearings on the bill, expanded the scope of the protections which the legislation afforded, the range of persons benefiting from the legislation's protections and those subject to

[140] The advance disclosure and filing provisions would have prevented persons from making cash tender offers or certain other acquisitions of securities until 20 days after filing information with the Commission and furnishing the information to the target company.

[141] This provision was limited to situations in which the target corporation's defensive tactics involved such repurchases.

[142] 112 Cong. Rec. 19003-19007 (1966).

[143] 113 Cong. Rec. 854-857 (1967). See also, Note, *Cash Tender Offers*, 83 Harv. L. Rev. 377, 381 at n. 28 (1969); Binder, *The Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569, 610-611 (1973); Hamilton, *Some Reflections on Cash Tender Offer Legislation*, 15 N.Y.L.F. 269, 275-276 (1969); Note, *The Williams Amendments: An Evaluation of the Early Returns*, 23 Vand. L. Rev. 700 (1970).

duties and obligations under the legislation by adding restrictions on the conduct of persons opposing tender offers. In particular, they greatly expanded the protections afforded to tender offerors against defensive tactics of their opponents. Further, in an effort to avoid the imposition of greater obligations on proponents than on opponents of tender offers, it cut back on some of the restrictions applicable to tender offerors.

First, S. 510, as the Commission recommended, deleted the original proposed amendments to the reporting and short-swing liability provisions of Section 16 of the Securities Exchange Act, thus relieving tender offerors of a considerable burden which the original proposal, S. 2731, would have imposed. S. 510 further changed the focus of the original bill, by transferring the provisions governing securities acquisitions, as distinguished from tender offers, from Section 10 to Section 13 of the Securities Exchange Act—a reporting section [144]—and by transferring those provisions dealing with tender offers to Section 14 of the Act, in accordance with the Commission's suggestion that "it would be appropriate to place these matters in Section 14 of the Securities Exchange Act of 1934, the proxy section, and incorporate in the

[144] With respect to acquisitions, S. 510 also changed the 20-day advance filing requirement to a requirement that the filing be made within 7 days after the acquisition (a 10-day interval was ultimately permitted). The Commission had suggested that a requirement for subsequent, rather than advance, filing "would be less burdensome. * * *" 112 Cong. Rec. 19004 (1966).

proposed statute administrative machinery to handle tender offers similar to the Commission's proxy rules." [145]

S. 510 also abandoned any provision for advance filing, removing a requirement which could have delayed and otherwise burdened tender offers.[146] And, in accordance with the Commission's suggestion, a provision was added to S. 510 permitting a tendering shareholder to withdraw his securities at any time during the first 7 days of the tender offer and at any time after 60 days from the commencement of the tender offer. As its history makes clear, this 7-day provision was intended not only to give shareholders who tender their shares immediately "a short period within which to reconsider," [147] but also to promote competing tender offers at higher prices by enabling the shareholder to withdraw his shares and accept a higher bid.[148]

[145] 112 Cong. Rec. 19005 (1966).

[146] Senate Report p. 4. See also, Senate Hearings, at pp. 74-75, 88-89, 98, 108, 111, 151, 163; House Hearings, at pp. 45, 52-53.

[147] Senate Report, p. 10; House Report, p. 10.

[148] In this regard, in response to questioning from Congressman Stuckey about whether competitive bidding was something "we ought to get away from," Mr. West of the New York Stock Exchange replied: "We think competition is the life of trade, and if they want to increase * * * [the bid], let them do it. It is a healthy thing." House Hearings, p. 47. Chairman Cohen promptly agreed, stating: "We think that competition is the life of trade, too." *Id.*

A pro-rata acceptance provision (ultimately Section 14(d)(6)) also was added by S. 510, in accordance with the Commission's suggestion,[149] to provide fairness for shareholders and to promote competition by facilitating competing tender offers. This was accomplished by precluding the tender offeror from using a "first-come, first-served" basis in accepting tendered shares, removing the pressures on shareholders to make hasty, ill-considered decisions and, to some extent, encouraging shareholders to wait for a better offer. The Senate Committee modified the pro-rata acceptance requirement, which, as introduced, would have applied throughout the life of the tender offer, by limiting the requirement to those shares which are tendered during the first 10 days of a tender offer or during the first 10 days after any increase in the tender offer—a provision opposed by the Commission as overly protective of tender offerors at the expense of the shareholders.[150] Con-

[149] As recommended by the Commission and introduced by Senator Williams, this provision would have required that, where a greater number of securities is deposited during the tender offer than the offer calls for, the securities shall be taken up pro rata according to the number deposited by each shareholder. 112 Cong. Rec. 19005 (1966); 113 Cong. Rec. 856 (1967).

[150] House Hearings, p. 42. Milton Cohen, writing in April 1968, after passage of the Senate version but before passage of the House version, confirmed the view that the changes made as a result of the presentation by the commentators at the hearings "avoid undue impediments to tender offers * * *." Cohen, *Tender Offers and Takeover Bids*, 23 Bus. Law. 611, 619 (1968). However, he warned: "I think that the proof will

gress disagreed and acted to assure equality of treatment to the "competing interests":

> "[Disadvantages to the original] approach * * * are that stockholders are encouraged to sit on the fence until the last moment and it tips the scales further in favor of management by affording it the life of the tender offer to marshall its considerable resources. A rule along the lines of the New York Stock Exchange policy should satisfactorily resolve the competing interests." [151]

Unlike S. 2731, which provided little protection against unfair activity by management or others in opposition to a tender offer, S. 510, in accordance with the Commission's suggestions, contained detailed provisions designed to provide broad protection not only against the improper conduct of tender offerors but also against that of persons opposing tender offers. For example, Section 14(d)(4),[152] added by S. 510, was proposed by the Commission to enhance its rulemaking authority to place the opposing parties

come in the actual administration of the law by the SEC, and it is here that vigilance will be required on the part of those concerned with the protection of offerees as well as those concerned with fostering freedom of enterprise." *Id.*

[151] Senate Hearings, p. 131 (footnotes omitted).

[152] "Any solicitation or recommendation to the holders of * * * a security to *accept or reject* a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors" (emphasis supplied).

"on a more nearly equal footing." [153] The broad scope of this rulemaking authority and the wide range of persons whose conduct would be subject to regulation thereunder were recognized in the Senate and House Reports, which stated:

> "Under this provision the Securities and Exchange Commission could specify the information to be included in any recommendation *by management or others in favor of or in opposition to a tender offer* and could regulate the solicitation of investors *by brokers and dealers* who are often compensated for shares tendered as a result of their activities. It would also enable the Securities and Exchange Commission to regulate the activities of *persons who make competing tender offers or seek to influence the investor's decision on a tender offer.*" [154]

And, in accordance with the Commission's suggestion, S. 510 added a self-operative provision—ultimately enacted as Section 14(e)—which, like Section 14(d)(4), expanded the legislation's protections against the conduct of persons who oppose tender offers.[155] In recommending this provision, the Com-

[153] 112 Cong. Rec. 19005 (1966).

[154] Senate Report, p. 9; House Report, p. 10 (emphasis supplied).

[155] Section 14(e), as enacted in 1968, provided:

> "It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders *in opposition to or in favor of* any such offer, request, or invitation.

15 U.S.C. 78n(e) (1968) (emphasis supplied).

See also Mundheim, *Tender Offers*, 2 Rev. of Securities Regulation 953, 956 (1969); Binder, *The Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569, 626-627 (1973); Bromberg, *The Securities Law of Tender Offers*, 15 N.Y.L.F. 459, 470-474 (1969); Hamilton, *Some Reflections on Cash Tender Offers*, 83 Harv. L. Rev. 377, 382 (1969); Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 Harv. L. Rev. 1250, 1259-1260 (1973).

mission recognized that its function under it, as its function under Section 14(d)(4), was to furnish broad protection against the conduct of persons both opposing and favoring a tender offer.[156] The Commission stated:

> "The Commission believes that a provision such as this presents an additional protection, beyond the rule-making power suggested in other parts of the bill, against possible dissemination of inaccurate or incomplete information or fraudulent acts or practices by persons who make or invite tender offers and affords a more practical means of preventing inaccurate or incomplete presentations or fraudulent acts or practices by persons opposing or favoring such tender offers than would be provided by additional rulemaking

[156] As originally proposed, this provision would have been part of Section 2 of S. 510, and therefore would not have reached solicitations in opposition to *exchange* offers, which had been exempted from Section 14(d). However, the provision became applicable to all tender offers when it was placed in a separate subparagraph of Section 14—Section 14(e).

> power with respect to acts and practices of such persons or to materials emanating from them in their efforts to get existing shareholders to accept or not to accept tender offers." [157]

Congress borrowed heavily from existing antifraud and misleading statement provisions in the federal securities laws, and the rules adopted under them by the Commission, in enacting Section 14(e), to assure the success of its attempts to require the fullest possible disclosure by tender offerors and those opposing them, as well as to assure the success of its attempts to proscribe conduct which might unfairly influence the outcome—one way or the other—of cash or exchange tender offers for corporate control.[158]

Unlike the other provisions of the Williams Act, however, Section 14(e), "in the tradition of the general fraud provisions of the [Securities Act of] 1933

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[157] 112 Cong. Rec. 19005 (1966). The Commission went on to explain that a provision like Section 14(e) would provide "a more practical means" of protection than additional rule-making authority, stating:

> "This would appear to be especially true in view of the shortness of time for * * * persons [opposing or favoring tender offers] to act after the tender offer is made and the fact that possible grounds for opposing or favoring varying types of tender offers are so wide and unpredictable in scope as to make it a difficult area to deal with on a rule-making basis." *Id.*

[158] 6 Loss, *Securities Regulation*, 3660-3661 (Supp., 1969); Bromberg, *The Securities Law of Tender Offers*, 15 N.Y.L.F. 462, 468, 470-474 (1969); Hamilton, *Some Reflections on Cash Tender Offer Legislation*, 15 N.Y.L.F. 269, 289-293 (1969); Binder, *The Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569, 610-611, 626-641 (1973).

and [the Securities Exchange Act of] 1934 * * *, applies to all securities without regard to registration." [159] But, in adapting the Commission's broad proxy and antifraud rules to tender offer contests, Congress did not simply proscribe only "fraudulent, deceptive or manipulative acts or practices, in connection with any tender offer" or "any solicitation in opposition to or in favor of any such offer * * *," as it had done in other provisions of the federal securities laws. Rather, as the Commission had done in adopting Securities Exchange Act Rule 14a-9, for proxy materials, Congress also intended to, and did, reach and prevent any misleading, inaccurate, inadequate or overly optimistic statements used by any of

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[159] Section 14(e) is broad and sweeping in its proscriptions. It governs conduct by any person involving either misleading statements or omissions of material facts, similar to the proscriptions contained in

> —Section 17(a) of the Securities Act (prohibiting fraud in the offer or sale of securities);
>
> —Section 10(b) of the Securities Exchange Act, and the Commission's Rule 10b-5 adopted under the latter section (barring fraudulent, deceptive or manipulative conduct in connection with the purchase or sale of any security);
>
> —Security Exchange Act Rule 14a-9, (proscribing misleading statements in proxy soliciting materials); and
>
> —Section 15(c)(1) of the Securities Exchange Act and Rules 15c-1 and 15c-2 under the latter section (governing the conduct of brokers and dealers in securities).

The borrowing from these sections and rules was not inadvertent. See, *e.g.*, Senate Hearings, p. 140 (testimony of Professor Painter).

the participants in the tender offer process—whether deliberately or inadvertently made.[160]

Section 14(e) also reflects the widespread recognition, as demonstrated by the allegations and findings of the Court below in this case (A. 7-A 18), that the success of a tender offer, management's opposition to a tender offer, or the outcome of a competing bidder's offer, often depend on manipulative activities in the marketplace to affect the market price of the target company's securities.[161] Accordingly, Section 14(e)

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[160] See, *e.g.*, Senate Hearings, p. 178 (testimony of then Chairman Cohen):

> "[T]he management may wish to put out literature opposing the bid. That literature may not be subject to easy establishment as being outright fraudulent, but it may be inadequate. It may omit material information."

See also, *id.*, p. 196 (testimony of Chairman Cohen) ("If management does oppose the offer, the present lack of regulation leaves it with powerful weapons, which it may wield with impunity, provided its activities fall short of fraud"); *id.*, p. 31 (testimony of Chairman Cohen) (analogizing the bill to the proxy rules and emphasizing the need for a prefiling provision to avoid inadvertent or advertent misleading statements); House Hearings, p. 17 (to the same effect); Senate Hearings, p. 159 (testimony of Donald Regan); *id.*, p. 99 (testimony of Ralph Saul ("the accuracy of the information [disseminated] is assured by the sanctions of [the substantially identical predecessor of Section 14(e)] of the bill * * *")); *id.*, p. 125 (testimony of Professor Mundheim).

[161] See, *e.g.*, 113 Cong. Rec. 855 (1967) (Remarks of Senator Williams); Senate Hearings, p. 3 (Remarks of Senator Williams); *id.*, p. 60 (testimony of Professor Hayes) ("we fully concur with the intent of the bill to eliminate the manipulation of the stock prices during the period that a tender offer is outstanding"). And see *id.*, p. 131 (testimony of Arthur Fleischer, Jr.).

bars any person from engaging in manipulative acts or practices generally, and, as amended in 1970, it also authorizes the Commission to define, and to adopt additional regulations to "prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive or manipulative."

Nor did Congress intend its general proscription against manipulative conduct in connection with tender offers to suffice. Recognizing that management, either directly or through its allies, had often engaged in repurchasing its own securities—deliberately or unintentionally—affecting the market price of its securities, and, concommitantly (or consequentially), deflating the attractiveness of an unfriendly tender offer, Section 13(e) of the Act was adopted to govern such repurchases and strip them of their intended or unintended manipulative effects.[162] It ac-

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[162] See, *e.g.*, 113 Cong. Rec. 856 (1967) (Remarks of Senator Williams):

> "Such stock purchase programs, however, may involve substantial amounts of securities and can have a substantial effect on the market price. There have been disturbing instances, where, it has been suggested, that such programs may have been utilized as a device to manipulate the market to serve the purpose of the corporation or of those who control it. *Even where no manipulative purpose exists, market impact can be substantial and, particularly where the corporations' incursions into the market occur sporadically, unnecessary and undesirable price fluctuations can result*" (emphasis supplied).

[Footnote continued on page 69]

complishes this task by making it unlawful for an issuer to purchase any of its own equity securities in contravention of Commission rules adopted to define and "to prescribe means reasonably designed to prevent" any "fraudulent, deceptive or manipulative" practices.[163]

[162] [Continued]

See also, Senate Hearings, p. 3 (remarks of Senator Williams); *id.*, pp. 27, 37 (testimony of Chairman Cohen).

The concern over manipulative purchases of the target corporation's stock extended to situations in which management had "no improper motive" (*id.*, p. 27) as well as to "purchases by a parent or subsidiary of the issuer, or anyone else in a control relationship with the issuer * * *" (*id.*, p. 28). And to "friends" of management, see *id.*, pp. 60, 62 (testimony of Professor Hayes).

[163] Commission rules under Section 13(e) may also require the issuer to furnish whatever information the Commission deems necessary or material with respect to such matters as the reasons for purchases; the source of the funds to be used; the number of shares to be purchased; the price; and the method of purchase.

F. Congress Recognized that the Williams Act Should Protect All Persons Interested in, or Affected by, Tender Offers.

The legislative history of the Williams Act is, as petitioners assert, replete with statements about the need to protect the shareholders of the target corporation.[164] But, the legislative history, as well as the specific language of the Williams Act, also demonstrates that Congress was well aware that "shareholders alone are not the only persons concerned" [165] and that there was a need to protect, and it intended to protect, a much broader range of interests and persons.

Detriment to the marketplace generally was forcefully before the Congress, and it sought to avoid that evil. Since "the confusion that develops [where there are competing offers at different prices] can have a very serious adverse affect on the public confidence in the integrity and openness of the securities markets," [166] Congress was concerned with the need to protect, and to place on an equal footing, all participants in the marketplace, including the businessmen who make tender offers, current stockholders and potential investors.[167]

Congress wanted to assure all participants not only that all material information would be available, but

[164] See, *e.g.*, Senate Hearings, pp. 2, 15, 16, 42, 43, 107.

[165] Senate Hearings, p. 178.

[166] Senate Hearings, p. 18.

[167] Senate Hearings, pp. 70-71; see also, 113 Cong. Rec. 854-855 (1967).

also that they would be participating in a fair contest in which all such information would also be available to the persons with whom they deal. As Senator Williams emphasized at the opening of the Senate hearings on S. 510.

> "It is our Nation's legitimate businessmen as well as the more than 20 million American shareholders who have the most to gain from this legislation. This bill will put all on an equal footing with respect to the availability of significant facts about a tender offer or a corporate stock purchase program. *All will be able to deal in the securities markets knowing that all of the pertinent facts are available. This is the premise under which our securities markets are supposed to work.*" [168]

Among the nonshareholder participants expressly recognized by Congress as needing protection were the target corporation and its management.[169] Senator Williams stressed that the Senate Committee had taken "extreme care" [170] to protect the legitimate interests of the corporation and its management.[171]

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[168] Senate Hearings, p. 3 (emphasis added). See also 113 Cong. Rec. 856 (1967). The foregoing concern for equality among participants has particular relevance to the provision involved in this case—Section 14(e)—which is expressly directed both to persons opposing and to those favoring a tender offer.

[169] 113 Cong. Rec. 854-855 (1967).

[170] Senate Report, pp. 3-4.

[171] 113 Cong. Rec. 854-855 (1967). See also, Senate Hearings, pp. 43, 46.

Similar protections were intended for the tender offeror. As noted, Congress expressed its interest in assuring the fairness of the competition for corporate control by providing equal rights and treatment in a tender offer contest so that "the forces in contention can have full play." [172] And the Congress emphasized that it had also taken "extreme care" to provide an equal opportunity to both the insurgents and the entrenched, "to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." [173] Providing that equality of opportunity was critical, Congress was told, because the "scales [were] pretty unbalanced * * * and unbalanced in the favor of management," [174] management, which one commentator observed, had "less and less responsibility and accountability to shareholders." [175]

Thus, the tender offer was seen as an alternative device to permit shifts in corporate control [176] from managements that had become smug and complacent in office.[177] Critics of early versions of the bill [178]

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[172] House Hearings, pp. 47-48; see also, House Report, p. 4; 113 Cong. Rec. 854 (1967); Senate Hearings, pp. 25, 204-205; *Fairer Deal for All In Takeovers Is The Aim*, The Times (of London), Sept. 6, 1967.

[173] Senate Report, p. 3.

[174] Senate Hearings, p. 117.

[175] Senate Hearings, p. 120; Senate Hearings, pp. 133-134.

[176] Senate Hearings, pp. 115-116.

[177] Senate Hearings, pp. 133-134.

[178] Professors Kaplan, Mundheim and Painter were the primary critics of the bill.

argued that it would discourage and impede tender offers, which served salutary purposes. Indeed, in their view, tender offers presented the only realistic opportunity to oust inefficient management.[179] Those entrenched were seen to be virtually unassailable through their control of the proxy machinery, and the challenging proxy solicitor was required to make a very costly investment without much chance of winning the fight.[180] The problem was compounded by the observable inertia of stockholders [181] and the fact that management had the use of corporate funds to purchase the securities of a disagreeing shareholder "to protect corporate policy" [182] and had "strong allies—banks with which the corporation keeps its deposits, insurance companies with which it places business, suppliers and customers." [183]

The results were predictable: proxy contests had become less effective [184] and management had been successful in over two-thirds of the tender offers at-

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[179] Senate Hearings, p. 116.

[180] Senate Hearings, pp. 116; 120, 121; 133-134.

[181] Senate Hearings, p. 121, citing *Kors* v. *Carey*, 39 Del. Ch. 47, 158 A. 2d 136 (1960) and *Cheff* v. *Mathes*, 41 Del. Ch. 494, 199 A. 2d 548 (1964).

[182] Senate Hearings, p. 121.

[183] Senate Hearings, pp. 137-138.

[184] Senate Hearings, p. 120.

tempted prior to 1966.[185] The commentators criticized S. 510 as tipping the scales even further in favor of management.[186]

As a result, Congress amended the draft bill to make it less burdensome to tender offerors—it eliminated any advance filing requirement for tender offers and it limited an offeror's obligation, in cases where more shares are tendered than requested, to accept shares tendered on a pro-rata basis to those shares tendered within the first ten days. Significantly, both of these changes were strongly opposed by the Commission, which believed that, in these areas, the interests of shareholders outweighed the interests of tender offerors.[187] Notwithstanding this objection, Congress made both changes, specifically indicating its desire to protect the tender offeror's "opportunity to fairly present [its] case." [188] In this regard, the Congress took some comfort from the Commission's concession that, if the bill did not adequately protect

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[185] Senate Hearings, p. 117.

[186] Senate Hearings, p. 127.

[187] Senate Hearings, p. 31; House Hearings, pp. 17-18, 42, 50, 53.

[188] Senate Report, p. 3; House Report, p. 4. During the House Hearings, for example, Chairman Cohen had noted "that in trying to take care of the company or the offeror we have to remember that the exercise here is to protect the investor. * * * the person to which this whole game is directed." But Congressman Stuckey disagreed: "I also think we have an obligation to the corporations of the United States." Chairman Cohen quickly concurred: "I could not agree with that more." House Hearings, p. 52.

the interests of tender offerors, particularly against management opposition to takeover efforts, the criticism of the bill—that it inadequately concerned itself with the interests of offerors—"would have considerable merit." [189] As S. 510 finally was enacted, Congress perceived that it had fulfilled the need for comprehensive legislation "substantially" to reduce "the ability of incumbent management to frustrate an attractive and desirable tender offer" [190]—even if the legislation would, as Chairman Cohen indicated, also "serve to help the takeover bidder." [191]

II. CONSISTENT WITH ITS PRIOR TEACHINGS, SOUND POLICY, AND UNDERLYING CONGRESSIONAL INTENT, THIS COURT SHOULD AFFIRM THAT A PRIVATE RIGHT OF ACTION MAY BE IMPLIED UNDER SECTION 14(e) OF THE SECURITIES EXCHANGE ACT ON BEHALF OF A COMPETING TENDER OFFEROR AGAINST THOSE WHOSE MISLEADING STATEMENTS HAVE INJURED IT.

As the foregoing discussion demonstrates, the Williams Act legislation adopted by the Congress in 1968, and strengthened by the amendments to it in 1970, creates the same "pervasive legislative scheme governing the relationship between * * *" the broad range of persons interested in, and interests affected

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[189] Senate Hearings, pp. 183, 184.

[190] Senate Hearings, pp. 184, 196.

[191] Senate Hearings, p. 178.

by, tender offers as this Court repeatedly has found to exist in the area of proxy regulation, *Cort* v. *Ash*, 422 U.S. 66, 82 (1975); *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964). And, as "[i]n *Borak*, the statute involved [here is] * * * clearly an intrusion of federal law into the internal affairs of corporations * * *" and the affairs of those seeking to engage in contests for corporate control. *Cort* v. *Ash*, *supra*, 422 U.S. at 85.

In adopting the Securities Exchange Act of 1934, Congress was acutely aware of the need for private civil enforcement of violations of the Act.[192] It recognized that the duties it had created in turn created rights in favor of persons injured by a breach of those duties, and that simple justice required recognition of the right of those so injured to be made whole for any wrongs they might suffer.[193] More importantly, Congress also was aware that, without private enforcement of the federal securities laws,

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[192] Congress provided express civil remedies in Sections 11, 12, and 15 of the Securities Act of 1933, 15 U.S.C. 77k, 77e, and 77o, and in Sections 9, 16, 18, and 20 of the Securities and Exchange Act of 1934, 15 U.S.C. 78i, 78p, 78r, and 78t. The legislative histories of the two Acts reveal the Congressional awareness of the need for private civil enforcement. See, *e.g.*, S. Rep. No. 47, 73d Cong., 1st Sess. 6 (1933); H.R. Rep. No. 85, 73d Cong., 1st Sess. 9-10 (1933); H.R. Rep. No. 152, 73d Cong., 1st Sess. 26-27 (1933); H.R. Rep. No. 1383, 73d Cong., 2d Sess. 36-37 (1934).

[193] See, *e.g.*, Sections 11, 12, and 15 of the Securities Act, and Sections 9, 18, 20, and 28(a) of the Securities Exchange Act; H.R. Rep. No. 1383, 73d Cong., 2d Sess. 36-38 (1934).

many violations of those laws likely would go undetected or unreported, and the legislative enactment would want for proper enforcement—a result inconsistent with Congress's express intention to make its scheme of regulation and control "reasonably complete and effective." [194]

In this case, one of the contestants in a contest for corporate control—entitled, by law, to fair competition in that contest—is seeking to enforce that duty and obligation, imposed by Section 14(e) of the Securities Exchange Act, against a rival contestant, the management of the target company and the allies of both. Aside from the notions of simple justice it serves to satisfy, the maintenance of such an action makes viable Congress's legislative enactment. In words applicable to the instant case, Thomas G. Corcoran, a spokesman for the principal drafters of the Securities Exchange Act,[195] explained why express civil liabilities had been included in the Act, and summed up the appropriateness and necessity of private actions in this context:

> "The principle of civil liability for the damage * * * is moreover not only a matter of justice to the person injured but is also the surest way of guaranteeing that there will be some compliance with the section. In other words, *there is no policeman so effective as the one whose*

[194] 15 U.S.C. 78b.

[195] See *Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. 1375, 1385 (1976).

> *pocketbook is affected by the degree to which he enforces the law.*" [196]

In full recognition of the remedial scope and breadth of the federal securities laws generally,[197] and the Securities Exchange Act specifically,[198] this Court's decisions have found that the need, justification and authority for implied remedies under the Securities Exchange Act is "clear".[199]

The clarity with which this Court discerned the appropriateness of such implied private remedies stems, in part, from the Act itself, since Section 27 of the Securities Exchange Act "*specifically* grants the appropriate District Courts jurisdiction over 'all suits in equity and actions at law to enforce *any* liability or duty created' under the Act." *J. I. Case Co.* v. *Borak, supra*, 377 U.S. at 430-431 (emphasis supplied); *accord, Securities Investor Protection Corporation* v. *Barbour*, 421 U.S. 412, 424 (1975); *Cort*

[196] Senate Committee on Banking and Currency, *Stock Exchange Practices: Hearings on S. Res. 84 (72d Cong.) and S. Res. 56 and S. Res. 97 (73d Cong.), pt. 15, National Securities Exchange Act of 1934*, 73d Cong., 1st Sess. 6518 (1934) (emphasis supplied).

[197] *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151 (1972); *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 12 (1972); *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967); *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963).

[198] *Ibid.*

[199] *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 430 (1964); *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 424 (1975).

v. *Ash*, *supra*, 422 U.S. at 79 n. 11. It also stems from the two-century old teachings of English jurisprudence that,

> "in every case, where a Statute enacts or prohibits a Thing for the Benefit of a Person, he shall have a Remedy upon the same Statute for the Thing enacted for his Advantage or for the Recompence of a Wrong done to him contrary to said law." [200]

And this jurisprudential wisdom was accepted by this Court in *Marbury* v. *Madison*, 1 Cranch 137, 163, 5 U.S. 87, 102-103 (1803), where Chief Justice Marshall stated: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."

[200] 1 Comyn's Digest 248 (1762).

This doctrine was applied by Lord Campbell in *Couch* v. *Steel*, 3 E. & B. 402, 411, 118 Eng. Reprint 1193, 1196 (Q.B. 1854). Despite criticism leveled at the decision's specific application of the principle cited in the text above (see, Thayer, *Public Wrong and Private Action*, 27 Harv. L. Rev. 317, 320 (1914)), the concept has been widely accepted in this country (see, *e.g.*, American Law Institute, *Restatement of Torts 2d* Sec. 286 (1965)), and apparently is the basis of some of this Court's prior decisions. See, *e.g.*, *Marbury* v. *Madison*, 1 Cranch 137, 5 U.S. 87 (1803); *Wyandotte Co.* v. *United States*, 389 U.S. 191, 202 (1967) (citing the *Restatement of Torts 2d* § 286); *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1972); *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*, 421 U.S. at 730; *cf.*, *Rondeau* v. *Mosinee Paper Co.*, 422 U.S. 49 (1975); see also, *Bell* v. *Hood*, 327 U.S. 678, 684 (1946).

Indeed, even in cases unlike the present one [201] where a "clear" [202] provision of the relevant statute does not "specifically" [203] grant jurisdiction to private parties to enforce the Act's liabilities and obligations, this Court has acknowledged the propriety of the federal courts implying a private right of action if there exists "a pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard, * * *" [204] or "standards of conduct that a private action could help to enforce * * *," [205] or "harm * * * of the type the statute was intended to forestall * * *." [206] Not one, but all three, of these factors exist here, as we have seen. As this Court has held in similar circumstances,

> "Congress has legislated and made its purpose clear; it has provided enough federal law in [the section under review] from which appropriate remedies may be fashioned even though they

[201] See, *e.g.*, *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964); *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 420-421 (1975); *Cort* v. *Ash*, 422 U.S. 66, 79-80 (1975).

[202] *Cort* v. *Ash*, *supra*, 422 U.S. at 79 n. 11.

[203] *Id.*, 422 U.S. at 82.

[204] *Cort* v. *Ash*, *supra*, 422 U.S. at 82.

[205] *Securities Investor Protection Corp.* v. *Barbour*, *supra*, 421 U.S. at 424.

[206] *Wyandotte Co.* v. *United States*, 389 U.S. 191, 202 (1967).

> rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great designs of this legislation."

United States v. *Republic Steel Corp.*, 362 U.S. 482, 492 (1960); *Wyandotte Co.* v. *United States*, 389 U.S. 191, 203 (1967).

But, as in *Borak*, "[t]he petitioners [here] make no concessions * * *." [207] They emphasize that Congress made no specific reference to a private right of action in Section 14(e) of the Act, at the same time ignoring Section 27 of the Act; that the right should not extend to suits by defeated tender offerors; and, as was unsuccessfully urged in *Borak*, that, even if a private right of action exists, it "should be limited to prospective relief only." [208] Accordingly, and although the question has been resolved time and again contrary to the posture they urge before this Court, the petitioners seek to present to the Court, once again, the argument "whether a private remedy is implicit in * * *" [209] the Securities Exchange Act —in this case, for tender offerors claiming injury as a result of petitioners' violations of law.

Even assuming that such an issue were a novel one, this Court recently has specified four factors it deems "relevant" in "determining whether a private remedy is implicit in a statute not expressly providing one * * *": [210]

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[207] *J.I. Case Co.* v. *Borak*, *supra*, 377 U.S. at 431.

[208] *Id.*

[209] *Cort* v. *Ash*, *supra*, 422 U.S. at 78.

[210] *Id.* (citations omitted, emphasis in original).

> —"First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' * * * that is, does the statute create a federal right in favor of the plaintiff?";
>
> —"Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?";
>
> —"Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?";
>
> —"And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"

A reading of *Cort*, *supra*, 422 U.S. at 78-85, makes clear that the private remedy so clearly and properly implied in *Borak* also would have met each of these four standards. Given the explicit Congressional intent to create an identical regulatory structure for tender offers as exists for proxies,[211] it is not surprising that application in this case of the four factors specified above compels the conclusion that it is also appropriate to accord standing to tender offerors to sue for injuries they have sustained as a result of violations of the Williams Act.[212]

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[211] See discussion at pp. 42-48, 52-54, *supra*.

[212] Note Section 1412(b) of the American Law Institute's proposed *Federal Securities Code*, which expressly provides that a "person who has made or proposes to make a tender request" has a cause of action against a defendant that has

A. Tender Offerors Are Within the Especial Class for Whose Benefit the Williams Act Was Enacted.

This Court has concluded that a plaintiff is "one of the class for whose especial benefit the statute was enacted," [213] and thus "inferred a federal private cause of action not expressly provided, * * *" [214] where there "generally" is either (1) a "pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard," [215] or (2) "a clearly articulated federal right in the plaintiff." [216] A tender offer seeking to enforce a violation arising under Section 14(e) of the Williams Act meets both alternatives of this *Cort* formulation.

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violated any of the various provisions specified therein dealing with tender offers. That provision further authorizes the court to award, among other forms of relief, "damages against the violator for any loss caused by his violation."

[213] *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U.S. 33, 39 (1916).

[214] *Cort* v. *Ash*, *supra*, 422 U.S. at 82, citing *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

[215] *Cort* v. *Ash*, *supra*, 422 U S. at 82.

[216] *Id.*, citing *J. I. Case Co.* v. *Borak*, *supra*.

1. The Williams Act Is a Pervasive Legislative Scheme Governing the Relationship Between a Tender Offeror and the Other Participants in a Contest for Control, Including the Target, a Competing Tender Offeror and Their Allies.

Although the Securities Act and Securities Exchange Act were viewed by the Congress that adopted them as vesting broad federal "jurisdiction over the source of and traffic in securities," [217] those acts were not sufficient to deal with tender offer abuses. As we have seen, prior to the Williams Act few controls existed over tender offers; existing federal law had but peripheral application,[218] common law restrictions were inapplicable or ineffective and state regulation either was nonexistent or not directed to the specific evils inherent in contested campaigns for corporate control.[219]

The Williams Act added Sections 13(d), 13(e), 14(d) and 14(e) to the Securities Exchange Act to provide sweeping protections for shareholders and contestants in a takeover battle—including tender offerors. Particularly with respect to Section 14(e) of the Act, drafted as a far-reaching, self-implementing supplement to the rulemaking powers granted to the Commission in the other parts of the Act, protections were provided against:

> "* * * dissemination of inaccurate *or* incomplete information *or* fraudulent acts *or* practices by

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[217] S. Rep. No. 1455, 73d Cong., 2d Sess. 393 (1934).

[218] See discussion at pp. 42-48, 52-54, *supra*.

[219] *Id.*

> persons who make or invite tender offers *and* [to] affor[d] a more practical means of preventing inaccurate *or* incomplete presentations *or* fraudulent acts *or* practices by persons opposing or favoring such tender offers." [220]

And, the breadth of Section 14(e) reflects Congress's desire that the new protections of the Act be interpreted "not technically and restrictively but flexibly to effectuate its remedial purposes," as this Court had interpreted pre-existing statutory provisions.[221]

As the legislative history of the Williams Act shows, acquisitions of "blocks of voting securities are typically alternatives to proxy solicitations as methods of capturing or preserving control".[222] The Act was "patterned after the present law and regulation which govern proxy contests",[223] where "an elaborate scheme of proxy regulation had been developed,"[224] and was designed "to provide the same kind of disclosure requirements" which exists for proxies.[225] In-

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[220] 112 Cong. Rec. 19005 (1966) (emphasis supplied).

[221] *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151 (1972); *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 12 (1972); *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967); *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963).

[222] Senate Hearings, pp. 16, 33.

[223] 113 Cong. Rec. 24665 (1967) (Remarks of Senator Williams).

[224] House Hearings, p. 21.

[225] 113 Cong. Rec. 24665 (1967) (Remarks of Senator Williams).

deed, since the pervasive scheme of proxy regulation had been variously termed as one of the "major accomplishments" of the Securities Exchange Act,[226] and "very likely the most effective disclosure device in the SEC scheme of things," [227] Congress sought to curb analogous abuses in connection with tender offers by employing similar means.[228] "The Williams Act is clearly related to the proxy provisions and should be construed to operate in harmony with them;" [229] a "rational consistency" must be maintained between the two provisions,[230] since they are "close companions" in a single, unified statutory scheme.[231]

In this context, therefore, both the proxy and tender offer regulations were designed to insure that, where there are competing interests, shareholders are provided with a balanced presentation of opposing arguments [232] and the opponents have an equal opportunity to compete for the control of the corporation:[233] the

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[226] 2 Loss, *Securities Regulation*, 1027 (2d ed., 1961).

[227] 113 Cong. Rec. 24664 (1967); see also 113 Cong. Rec. 9340 (1967) and text and notes, *supra*, pp. 47-48.

[228] See *H. K. Porter Co.* v. *Nicholson File Co.*, 482 F.2d 421, 423 (C.A. 1, 1973).

[229] *Bath Indus. Inc.* v. *Blot*, 427 F.2d 97, 100 (C.A. 7, 1970).

[230] *Id.*, 427 F.2d at 110.

[231] *GAF Corp.* v. *Milstein*, 453 F.2d 709, 719 (C.A. 2, 1971).

[232] See Senate Hearings, p. 206.

[233] *Id.* The Commission has recently published, and now has under consideration, proposals to amend its tender offer rules pursuant to Section 14(e). Securities Act Rel. No. 5731 (Aug. 2, 1976). If adopted, the Commission's proposals would, among

pervasiveness of the two regulatory schemes is parallel and co-extensive.[234]

2. *The Williams Act Creates an Articulated Federal Right in Favor of Each of the Participants in the Contest for Control, Including Tender Offerors.*

While Senator Williams' original legislative proposal isolated target management as the "especial class" to be protected from the predatory activities of "corporate raiders," [235] the bill finally enacted sought to avoid tipping the balance in favor of either contestant and to assure that tender offerors would have a fair competitive environment in which to bid for control.[236] As this Court recently confirmed:

> "The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts. Indeed, the Act's draftsmen

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other things, require target companies to furnish offerors their most recent shareholder lists "in order to provide the bidder with an opportunity to directly communicate with security holders equal to that of the subject company."

[234] The pervasiveness of the regulatory pattern over tender offers and its parallel to the regulation of proxy solicitations are further underscored by the Commission's recent proposals to amend its tender offer rules. These relate to disclosure, dissemination of materials and the fairness of the contest. See Securities Act Rel. No. 5731 (Aug. 2, 1976).

[235] See discussion at pp. 54-58, *supra*.

[236] See discussion at pp. 69-74, *supra*.

> commented upon the 'extreme care' which was taken 'to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid.' " [237]

The scales that had been unbalanced in favor of management were righted as the legislation progressed through the Congress: tender offerors were relieved from the attempt to impose the considerable burdens of Section 16 of the Securities Exchange Act contained in Senator Williams's original bill; prefiling provisions that would have delayed tender offers were abandoned, and withdrawal provisions which benefited shareholders as much as competing tender offerors were added; *pro rata* provisions were included—even over the objection of the Commission that they were overly protective of offerors at the expense of shareholder-offerees; and, broad rulemaking authority was provided for the Commission to place insurgents and entrenched management on a more equal footing.[238] Most significantly, the Commission recommended, and the Congress adopted, Section 14(e) as a self-operative provision of the Act which, far from arrogating special status to targets or even shareholders, furnished protections to each participant and neutralized some of the powerful weapons that might otherwise be available to the management of the target.

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[237] *Rondeau* v. *Mosinee Paper Co.*, 422 U.S. 49, 58-59 (1975).

[238] See discussion at pp. 54-69, *supra*.

The legislative history of the Act evidences an intent to establish federal rights for tender offerors. References in the legislative record for a need to provide a viable alternative to proxy contests as a means of effecting shifts in corporate control,[239] and reducing the ability of incumbent management to frustrate desirable tenders[240]—even if that would "serve to help the takeover bidder"[241]—cannot be viewed otherwise. Nor can the specific references in favor of tender offerors in such provisions as Sections 14(d)(4) and 14(e) of the Act—establishing requirements of fairness and honesty to be obeyed by persons *opposing* tender offerors—be read as anything other than evidencing a Congressional intent to protect offerors as well as shareholders.

Finally, such indications also are apparent from judicial determinations under the proxy regulation provisions as well as the Williams Act, that tender offerors have an articulated federal right under Section 14(e).[242] Indeed, although the plaintiff in *Borak* was a shareholder suing individually and derivatively, this Court recognized that "[t]he purpose of Section 14(a) is to prevent management *or others* from obtaining authorization for corporate action by

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[239] See, *e.g.*, S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess., 4 (1968); Senate Hearings, pp. 115-116.

[240] See discussion, *supra*, at pp. 44-47, 61-68, 69-74.

[241] Senate Hearings, p. 178.

[242] See discussion at pp. 109-123, *infra*.

means of deceptive or inadequate disclosure in proxy solicitation." *J. I. Case Co.* v. *Borak, supra*, 377 U.S. at 431 (emphasis supplied). *Accord, Union Pacific Railroad Company* v. *Chicago and North Western Railway Company*, 226 F. Supp. 400, 406 (N.D. Ill., 1964), where the court had no difficulty in finding that a proxy contestant had "a genuine interest" in assuring that its efforts would not be thwarted by the "prohibited conduct" of a rival contestant.[243]

In the same vein, the court in *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F. 2d 787 (C.A. 2, 1969), commented that, had the Williams Act been in effect at the time of the conduct there complained of by the plaintiff tender offeror, "Section 14(e) * * * should [have] serve[d] to resolve any doubts about standing in the tender offer cases. * * *" *Id.*, at 798-799. *Accord, Sargent* v. *Genesco*, 492 F.2d 750 (C.A. 5, 1974) ("the right to bring suit has not been limited to tendering offerees but has been extended to numerous other parties who claimed to be victims of 14(e) violations"); *H. K. Porter Co.* v. *Nicholson File Co.*, 482 F.2d 421 (C.A. 1, 1973) (recognizing the standing of an offeror to maintain an action against a target).

The specific legislative provisions of the Williams Act, the legislative record of the Congress and judicial determinations reviewing them all demonstrate that a federal right in tender offerors to enforce the provisions of the Williams Act was articulated by the Congress.

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[243] See discussion at pp. 69-74, *supra*, and 109-111, *infra*.

B. Congress Was Aware of the Importance of Private Remedies for Participants in Tender Offers in Enacting the Williams Act.

As this Court has noted, "in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such [a] cause of action would be controlling." *Cort* v. *Ash*, 422 U.S. at 78 (emphasis in original). Here, there is, of course, no legislative history that can be cited as evidencing "an explicit purpose to *deny*" a cause of action to participants in tender offers, and, indeed, there is ample evidence that Congress was aware of the need for such private remedies.

This Court's concern with the absence of an "explicit purpose to *deny* [a private] cause of action" was preceded by almost 30 years in the first case implying a private remedy under the federal securities laws, the "seminal" [244] case of *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512, 514 (E.D. Pa., 1946):

> "Of course, the legislature may withhold from parties injured the right to recover damages arising by reason of violation of a statute *but the right is so fundamental and so deeply ingrained in the law that where it is not expressly denied the intention to withhold it should appear very clearly and plainly.* The defendants argue that such intention can be deduced from the fact

[244] *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975).

that three other sections of the statute (Sections 9, 16 and 18) each declaring certain types of conduct illegal, all expressly provide for a civil action by a person injured and for incidents and limitations of it, whereas Sec. 10 does not. The argument is not without force. Were the whole question one of statutory interpretation it might be convincing, but the question is only partly such. *It is whether an intention can be implied to deny a remedy and to wipe out a liability which normally, by virtue of basic principles of tort law accompanies the doing of the prohibited act.* Where, as here, the whole statute discloses a broad purpose to regulate securities transactions of all kinds and, as a part of such regulation, the specific section in question provides for the elimination of all manipulative or deceptive methods in such transactions, the construction contended for by the defendants may not be adopted. In other words, in view of the general purpose of the Act, the mere omission of an express provision for civil liability is not sufficient to negative what the general law implies." [245]

Far from expressing a clear and plain intention to withhold private remedies under the Williams Act, Congress chose to enact the broad and inclusive proscriptions of Section 14(e), fully aware of the pre-

[245] See also, *Cort* v. *Ash*, *supra*, 422 U.S. at 79, 80, 82-83 n. 14; *cf. National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458-461 (1974); *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464, 471-472, 477 & n. 18 (1959); *Wyandotte Co.* v. *United States*, 389 U.S. 191, 199-200 (1967).

dictable consequences that had attached to similar legislative enactments—enforcement would be effected by both the Commission *and* private litigants.

Professor Carlos Israels specifically brought *J. I. Case Co.* v. *Borak*, *supra*, 377 U.S. 426, and its implications for private actions under the proposed bill, to the attention of the Congress when he testified that, presumably, "under *J. I. Case Co.* v. *Borak*," a "private litigant could seek . . . relief" under the Williams Act.[246] Much in the same vein, Professor William Painter advised the legislators that language, similar to that of Section 14(e), was "being judicially construed to allow not only injunctive relief by the Commission and criminal penalties for willful violations but also private remedies to injured investors * * *."[247] Chairman Cohen expressly referred to the fact that litigation between private parties engaged in a tender offer battle was a common occurrence,[248] and alerted the Congress to the fact that the buyer-seller limitation attributed to Rule 10b-5[249] made such litigation ineffective[250]—a problem Congress expressly remedied by its more liberal standing

[246] Senate Hearings, p. 67 (citation omitted).

[247] Senate Hearings, p. 140.

[248] House Hearings, p. 19; *cf.*, House Hearings, pp. 22-30, 59; Senate Hearings, p. 143.

[249] *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (C.A. 2, 1952), *certiorari denied*, 343 U.S. 956 (1952); adopted by this Court in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975).

[250] House Hearings, p. 59.

requirements in Section 14(e).[251] These references were consistent with the views of other commentators who, contemporaneously with Congress's consideration of the Williams Act, published their conclusions that the Williams Act, if passed, would establish private rights of action.[252]

Moreover, the Congress explicitly acted to improve existing controls over inaccurate or misleading disclosures after being apprised of the obstacles private litigants were encountering in enforcing liabilities for inaccurate or misleading disclosures.[253] And, Con-

[251] See, *e.g.*, *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787, 798-99 (C.A. 2, 1969); *Iroquois Indus., Inc.* v. *Syracuse China Corp.*, 417 F.2d 963, 969 (C.A. 2, 1969), *certiorari denied*, 399 U.S. 909 (1970); *Electronic Speciality Co.* v. *International Controls Corp.*, 409 F.2d 937, 940-941 (C.A. 2, 1969).

[252] See, *e.g.*, Kennedy, *Tender Moment*, 23 Bus. Law. 1091, 1114 (1968); Swanson, *S. 510 and the Regulation of Cash Tender Offers: Distinguishing St. George from the Dragon*, 5 Harv. J. Legis. 431, 444 (1968). Fleischer & Mundheim, *Corporate Acquisition By Tender Offer*, 115 U. Pa. L. Rev. 317 (1967).

[253] House Hearings, p. 59.

An early Commission memorandum suggesting the need for a misleading statements provision—ultimately enacted as Section 14(e)—noted that such a section would provide "a more practical means of preventing inaccurate or incomplete presentations * * * by persons opposing or favoring * * * tender offers * * * especially * * * in view of the shortness of time for such persons to act after the tender offer is made * * *" 112 Cong. Rec. 19003 (1966). Implicit in providing a "more practical means" of enforcing the obligations of Section 14(e) is the necessity of providing a private rem-

gress expanded Section 14(e) in 1970; by that time, the courts already had taken major steps toward defining the widest possible extent of standing under the Act.[254]

With no specific references in the legislative history to deny private actions, both explicit and implicit references to the need for, and desirability of, private enforcement of the provisions of the Williams Act, and the decision by Congress to place the Williams Act in Section 14 of the Securities Exchange Act with the proxy provisions where private remedies had been recognized, Congress was well aware of the likely impact of its actions. Thus, implication of a legitimately anticipated private cause of action for Williams Act violations is consistent with the second standard set forth in *Cort*.

C. It is Consistent with the Underlying Purposes of the Legislative Scheme of the Williams Act to Imply a Private Remedy for Tender Offerors.

In *Cort* v. *Ash*, *supra*, a third factor identified as relevant to the implication of a private remedy is whether such a remedy is consistent with the legis-

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edy. And, to give full effect to that remedy, each party referred to, as a participant in the tender offer contest, must have standing to pursue it.

[254] See, *e.g.*, *Butler Aviation International, Inc.* v. *Comprehensive Designers, Inc.*, 425 F.2d 842 (C.A. 2, 1970); *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (C.A. 2, 1969); *Iroquois Indus. Inc.* v. *Syracuse China Corp.*, *supra*, 417 F.2d 963; *Electronic Speciality Co.* v. *International Controls Corp.*, 409 F.2d 937 (C.A. 2, 1969).

lative scheme involved. In *Borak*, private remedies were found to be a necessary supplement to Commission actions; for much the same reasons, private remedies under the Williams Act are also such a necessary supplement, and are consistent with the legislative scheme. These conclusions are buttressed, in part, by reference to the judicial expansion of private rights under both the proxy and tender offer provisions of the Securities Exchange Act. The history of these cases evidences that, in order to effectuate the purposes of the Act, the courts indeed have been "alert" [255] to fashion appropriate principles of standing and necessary policies for effective relief.

1. *Private Rights of Action Are a Necessary Supplement to Commission Action to Make Effective the Congressional Purpose in Enacting the Williams Act.*

The Commission's administration of the Williams Act necessarily imposes heavy burdens on it, and these burdens have been increasing. Thus, the Commission:

—(1) receives filings made pursuant to Sections 13(d)[256] and 14(d)[257] of the Act on Commission forms Schedule 13D[258] and 14D[259] respectively—filings that have, in

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[255] *J. I. Case Co.* v. *Borak*, 377 U.S. at 433.

[256] 15 U.S.C. 78m(d).

[257] 15 U.S.C. 78n(d).

[258] The information to be included in a Schedule 13D is set out at 17 C.F.R. § 240.13d-101.

[259] The information to be included in a Schedule 14D is set out at 17 C.F.R. § 240.14d-101.

the aggregate, increased in number from 321 to 1,184 in the past 6 years;[260]

—(2) reviews the information filed, both to determine whether there has been compliance with the governing provisions and conformity with representations contained in reports and other filings made by the participating parties pursuant to other statutory requirements; [261]

—(3) responds to information and complaints received from the target, its shareholders, securities exchanges, market professionals, etc.; and

—(4) litigates to cure such violations as its resources permit.[262]

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[260] In fiscal year 1969, the first year of the effectiveness of the Williams Act, there were 251 acquisition, or Schedule 13D, filings, and 70 tender offer, or Schedule 14D, filings. By fiscal year 1976, these figures had increased to 1,077 and 107, respectively.

[261] For example, the staff of the Commission's Division of Corporation Finance often reviews, in connection with filings made pursuant to the Williams Act, prior annual reports filed pursuant to Section 12, 15 U.S.C. 78*l*, on Form 10-K and conducts related computer inquiries to verify information filed. The staff's review may also involve referrals to and consultation with other Divisions of the Commission and other state and federal agencies. In one situation, Societe Imetal's tender offer for the common stock of Cooperweld Corporation, for example, the Commission's staff consulted with, among others, the Departments of Justice, Treasury, Defense and Commerce, on specific questions arising out of the information filed.

[262] Reflecting its limited resources and reliance upon private actions, the Commission has brought very few suits alleging violations of Section 14(e), as opposed to the reporting provisions, of the Williams Act. A search of the Commission's files reveals that seven such actions have been brought since 1968. Three of these suits are pending, *Securities and Exchange Commission* v. *Thermal Power Co.*, Civ. No. 75-2000 (LHB) (N.D. Cal.); *Securities and Exchange Commission* v. *Mize, et al.*, Civ. No. 75-H-1420 (S.D. Tex.); *Securities and Exchange Commission* v. *Roussel, et al.*, Civ. Action No. 76-2571 (E.D. La.); a consent injunction has been obtained in two, *Securities and Exchange Commission* v. *CINKE Int'l Corp., et al.* (D. D.C.), SEC Lit. Rel. Nos. 5386 (Apr. 26, 1972) and 5465 (Jul. 17, 1972); *Securities and Exchange Commission* v. *General Host Corp., et al.*, 73-Civ.-275 (S.D. N.Y.), a partial consent judgment has been entered in one, *Securities and Exchange Commission* v. *Medic-Home Enterprises, Inc., et al.*, Civ. No. 75-6227 (S.D. N.Y.), and the Commission is considering taking an appeal from an order dismissing the complaint in *Securities and Exchange Commission* v. *Roven, et al.*, Civ. No. 75-3413 (C.D. Cal.).

The dramatic increase in the number of tender offers in recent years,[263] increases in the Commission's regulatory and enforcement responsibilities in other areas, as well as the fact that, particularly in the tender offer area, "[t]he Government's ingenuity is frequently no match" for the ingenuity of those in the contest,[264] have strained the Commission's limited resources.[265]

The major restraints on the Commission's staff in this area are aggravated by the fact that the economic, business and methodological complexities of tender offers need closer attention than even the most vigilant governmental agency can hope to provide

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[263] See pp. 25-26, 96, *supra*.

[264] House Hearings, p. 22.

[265] The professional staff of the Commission's Office of Tender Offers, Acquisitions and Small Issues consists of five professional persons.

within the brief, but full, fury of a contested tender offer. The speed with which the Commission is called upon to act was emphasized to the Congress during its consideration of the Act:

> "The pace of tender offers accelerates and we have received from numerous Members of Congress many businessmen, lawyers, and State and local officials expressions of serious concern with respect to various takeover bids which have been attracting so much attention. Allegations of fraudulent or improper practice are frequent. In fact, they are usual, and litigation alleging fraud by one side or the other in a contested tender offer occurs almost weekly. It is almost standard operating procedure.
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> "We have had to respond that we will investigate allegations of fraud to the extent that they fall within our jurisdiction, and indeed we have. But, owing to the time required for such investigations, it may be that the tender offer will be all over before the investigation is completed." [266]

The timing in tender offers is even more critical than this Court found to exist with respect to proxy solicitations in *Borak, supra*, 377 U.S. at 432.[267] In any event, for both proxy contests and tender offers,

> "Time does not permit an independent examination of the facts set out in the * * * material [filed] and this results in the Commission's acceptance of the representations contained there-

[266] House Hearings, p. 19.

[267] 1 Flom, Lipton & Steinberger, *Takeovers and Takeouts —Tender Offers and Going Private* 10-11 (Law Jl. Pr., 1976); Aranow & Einhorn, *Tender Offers for Corporate Control* 10-11 (1973).

> in at their face value, unless contrary to other material on file with it." [268]

Moreover, unlike proxy soliciting materials, which are submitted for staff review and comment before a formal "filing" is made, and registration statements, for which there is a statutory "waiting period" permitting staff review, the Williams Act does not provide the Commission an opportunity for review of and comment on filed materials before requests or invitations for tenders are made to offerees.[269] And, the contest can be completely won or lost during the ten day period that Section 14(d)(6) of the Act requires the offer to be kept open.[270]

During the hearings, Chairman Cohen had vigorously contended that prefiling of soliciting material by offerors had worked well under the proxy rules, and would "serve the best interests of the shareholder." [271] He advised that an undesirable alternative to prefiling would be court action, but Congress declined to tip the scales against offerors by requiring prefiling.[272]

[268] *Borak, supra*, 377 U.S. at 432.

[269] Senate Report, p. 4.

[270] That provision, in effect, requires that a tender offer be kept open for a minimum period of 10 days when "less than all the outstanding equity securities of a class" are being sought. Section 14(d)(5) of the Act has the effect of requiring that a tender offer be kept open for at least seven days, when the offer is for all of the stock.

[271] House Hearings, p. 18.

[272] As noted at pp. 27-31, 49-50, *supra*, the element of surprise is important to offerors. If management is apprised too

While court action by the Commission is always a possibility, if it is to be effective it must come at an early stage in the tender offer process, before it becomes difficult, if not impossible, to "unscramble the eggs." [273] But, aside from the practical infirmities preventing Commission suits at the incipient stages of a tender offer, such suits by the Commission unfortunately could also conflict with the "extreme care" employed by Congress to avoid tipping the scales in favor of either side. As Chairman Cohen emphasized, Commission suits could be used as an argument that "the government is against you":

> "I think that our concern really stems from our sensitivity that the Government should stay out of involvement in these contests as much as possible. * * * We just did not want the Commission to be in the position perhaps of compelling changes or going to court because once you do that no matter how well you qualify what you are doing it is going to be used by the other parties as an argument that 'the Government is against you.' This is the reason why the Commission hesitates, unless no other course is possible, to go to court on these situations.[274]

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early of an impending tender offer, it can use its effective weapons to thwart the offer before it ever gets started. Flom, Lipton & Steinberger, *supra*, at 12-13.

[273] *Sonesta International Hotel Corp.* v. *Wellington Assoc.*, 483 F.2d 247, 250 (C.A. 2, 1973).

[274] House Hearings, p. 53. See also, Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. Pa. L. Rev. 317, 361 (1967). Private lawsuits, on the other hand, do not present the danger of tipping the scales in favor of one side or the other.

In this regard, the views of the Commission expressed by Chairman Cohen echoed the sentiments espoused a decade earlier by then Commission Chairman Armstrong, who commented to the Congress on the Commission's role in proxy contests:

> "The Commission makes no attempt to guide, control or interfere in the strategy of participants in a contest for control. * * * The Commission is and must be scrupulously neutral; it neither takes sides nor plays favorites in proxy contests." [275]

In declining to require prefiling of tender offers,[276] Congress opted instead for "a more practical means of preventing inaccurate or incomplete presentations" [277]—Section 14(e)—even though such a provision would aid offerors.

The Commission must rely to a great extent, therefore, on private enforcement of the provisions of the Act by the parties involved. "[T]here is no policeman so effective as the one whose pocketbook is af-

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[275] Senate Committee on Banking and Currency, *Hearings on S. 879*, 84th Cong., 1st Sess. 1695 (1956).

[276] The bill would not have required materials used in opposition to any tender offer to be prefiled and solicitations in opposition to exchange offers would have been exempt from Section 14(d)(4) coverage. Thus, at the time of the House Hearings, only Section 14(e) could have covered inadvertant misstatements and omissions by both parties. Both Professor Mundheim and Ralph Saul, the president of the American Stock Exchange, had testified that the Section 14(e) protections would prevent such inaccurate statements. See Senate Hearings, pp. 99, 125.

[277] 112 Cong. Rec. 19005 (1966).

fected by the degree to which he enforces the law." [278] He alone has the greatest "incentive to detect violations and vigorously pursue remedies," all in furtherance of the purposes of the Act.[279]

No less so than with respect to proxies, private enforcement by those with a sufficient economic stake in the imposition of the law's requirements under the Williams Act *is* a "necessary supplement to Commission action * * * necessary to make effective the Congressional purpose." *J. I. Case Co.* v. *Borak*, *supra*, 377 U.S. at 432-433.

> "Since it is impossible as a practical matter for the government to seek out and prosecute every important violation of laws designed to protect the public in the aggregate, private actions brought by members of the public in their capacities as investors *or competitors*, which incidentally benefit the general public interest, perform a vital public service."

Gulf & Western Industries, Inc. v. *Great Atlantic & Pacific Tea Co., Inc.*, 476 F.2d 687, 699 (C.A. 2, 1973) (emphasis supplied).[280]

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[278] See pp. 76-77, *supra*.

[279] *H. K. Porter Co., Inc.* v. *Nicholson File Co.*, 482 F.2d 421, 424 (C.A. 1, 1973).

[280] Underlying this Court's decision in *Borak*, is a recognition that, in the absence of implied remedies, the Commission itself will be required to pursue such violations, increasing governmental intervention, rather than decreasing it,

2. *Judicial Determinations Under the Proxy Regulation Provisions of the Securities Exchange Act Have Provided Those Private Remedies Necessary to Make Effective the Congressional Purpose.*

Judicial determinations recognizing that private parties have a right under Section 27 of the Securities Exchange Act to bring suit for violations of Section 14(a) of that Act are consistent with the "duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional 'purpose'," *J. I. Case Co.* v. *Borak*, 377 U.S. at 433. Responding to that duty, the courts have liberally and justifiably [281] afforded standing to proxy contestants as well as shareholders to effect the broad remedial purposes of the Act. The decisions of the lower federal courts reflect an inclination to adjust and broaden concepts of standing whenever it appears that more restrictive approaches could frustrate and impede the Congressional intent underlying the proxy provisions.

Thus, at least a decade before this Court's decision in *Borak*, *supra*, Section 14(a) of the Act generally was presumed to afford shareholders a private right

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and, perhaps, in order to do the same job, requiring for the Commission

> "a blank check appropriation which we will never have and which we cannot responsibly seek * * *."

Fundamental Investors Inc., 41 S.E.C. 285, 302-303 (1962) (concurring opinion of Commissioner Whitney).

[281] See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975).

of action,[282] notwithstanding the fact that the Securities and Exchange Commission had the express right to bring suit to enforce the provisions of that Section.[283] But, in the earliest cases, the plaintiffs most likely to succeed on the merits in an action under Section 14(a) were those whose litigation was contemporaneous with an action by the Commission against the same defendant or who were otherwise able to overcome the deference accorded by some courts to the Commission staff's review of proxy material.[284] Requiring either the concurrence or assist-

[282] See, *e.g.*, *Textron, Inc.* v. *American Woolen Co.*, 122 F. Supp. 305, 308 (D. Mass., 1954); *Mack* v. *Mishkin*, 172 F. Supp. 885, 888, (S.D. N.Y., 1959).

[283] *Dann* v. *Studebaker-Packard Corp.*, 288 F.2d 201, 208 (C.A. 6, 1961); see also, Section 21 of the Securities Exchange Act, 15 U.S.C. 78u.

[284] *Mack* v. *Mishkin*, 172 F. Supp. 885, 888 (S.D. N.Y., 1959). See also *Doyle* v. *Milton*, 73 F. Supp. 281, 285-286 (S.D. N.Y., 1947), in which the court relied upon interpretive statements of the Commission; *Dunn* v. *Decca Records*, 120 F. Supp. 1, 2 (S.D. N.Y., 1954), in which the court relied upon an "informal opinion" from an official at the Commission; the consolidated cases of *Central Founding Co.* v. *Gondleman* and *Securities and Exchange Commission* v. *Gondleman*, 166 F. Supp. 429 (S.D. N.Y., 1958) where the court, in granting an injunction in favor of the corporate plaintiff, was apparently swayed by the fact that the Commission had made extensive comments on the committee's proxy material and had ordered its own investigation in connection therewith; *United Industrial Corporation* v. *Henwood*, CCH Fed. Sec. L. Rep. ¶ 91,142 (S.D. Cal., 1962), with facts similar to *Gondleman* except that the Commission chose to bring a separate action rather than intervene on the plaintiff's behalf; and *Securities and Exchange Commission* v. *Henwood*, CCH Fed. Sec. L. Rep. ¶ 95,125 (S.D. Cal., 1961), *affirmed*, 298 F.2d 641 (C.A. 9, 1962) where both the incumbent management and the Commission obtained injunctions against the voting of proxies obtained in response to proxy material which failed to reveal the identity of the principal members of the opposition committee.

ance of the Commission before a suit could be brought by a shareholder purportedly injured by a violation of Section 14(a) was a decided disadvantage—particularly for any private party whose claim arose from proxy material about which the Commission might have had some doubt, but which it did not think justified enforcement action in light of its administrative limitations.

The need for an unfettered right of private action to supplement the limited resources of the Commission became more apparent with the passage of time, the proliferation of public corporations, and the increased use of proxy contests as a means of gaining corporate control. It finally was recognized in *Dann* v. *Studebaker-Packard Corp.*, where the Sixth Circuit held that:

> "* * * a private investor who has been injured by a violation of this section [Section 14(a)] may bring an action in his own behalf, and he does not have to wait for the SEC to bring it for him." [285]

Three years later, this Court in *Borak* confirmed that holding, finding such a right "clear" in light of Section 27 of the Act, and because "the Court

[285] 288 F.2d 201, 209 (1961).

agreed that private enforcement of the proxy rules was a necessary supplement to SEC enforcement." *Securities Investor Protection Corporation* v. *Barbour*, 421 U.S. 412, 424 (1975).

In *Borak*, however, private rights of action under Section 14(a) were not restricted to shareholders. Instead, taking a more expansive view of the Congressional purpose in adopting Section 14(a), and why private actions would not only be consistent with, but further, that purpose, this Court asserted:

> "The damage suffered results not from the deceit practiced on [the stockholder] alone but rather from the deceit practiced on the stockholders as a group."

Id., at 432.

Using this conclusion to justify the implication of derivative actions as well as direct suits to vindicate Section 14(a),[286] this Court also struck down artificial

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[286] *Borak* conclusively established the right of private enforcement in derivative (see, *e.g.*, *Dillon* v. *Berg*, 326 F. Supp. 1214 (D. Del., 1971), *affirmed*, 453 F.2d 876 (C.A. 3, 1971)), or shareholder actions. As a result, standing to sue no longer is placed in issue, and resolution of the cases generally depends on such substantive matters as the materiality of the alleged misstatement, (see, *e.g.*, *Swanson* v. *American Consumers Indus., Inc.*, 475 F.2d 515 (C.A. 7, 1973)); the causal relationship between the misstatement in the proxy material and the consummation of the transaction (see, *e.g.*, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970)); the standard of liability to be applied to the officers and directors responsible (see, *e.g.*, *Norte & Co.* v. *Huffines*, 416 F.2d 1189 (C.A. 2, 1969), *affirming*, 304 F. Supp. 1096 (S.D. N.Y., 1968)); the damages to be awarded (see, *e.g.*, *Ohio Drill & Tool Co.*

barriers that some courts had attempted to erect to meaningful relief.[287] Rejecting the proposition that federal jurisdiction was limited to declaratory or prospective relief only,[288] this Court reaffirmed that,

> "* * * where legal rights have been invaded, and a federal statute provides for *a general right to sue* for such invasion, federal courts may use any available remedy to make good the wrong done." [289]

Since *Borak*, the courts have continued to adjust concepts of standing in implied actions under the Commission's proxy rules, to foster the underlying Congressional intent. In so doing, standing has liberally been accorded to the contestants in proxy contests.

One of the earliest proxy contests in which it was explicitly held that a target corporation had a private right of action to sue an insurgent for violation

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v. *Johnson*, 498 F.2d 186 (C.A. 6, 1974)); the financial injury suffered (see, *e.g.*, *Berman* v. *Thomson*, 312 F. Supp. 1031 (N.D. Ill., 1970)); the practicality of injunctive relief (see, *e.g.*, *Denison Mines Ltd.* v. *Fibreboard Corp.*, 388 F. Supp. 812 (D. Del., 1974)); or retrospective relief (see, *e.g.*, *Beatty* v. *Bright*, 318 F. Supp. 169 (1970), *supplemented by* 345 F. Supp. 1188 (S.D. Iowa, 1973)).

[287] See, *e.g.*, *Dann* v. *Studebaker-Packard Corp.*, 288 F.2d 201 (C.A. 6, 1961).

[288] 377 U.S. at 431-433.

[289] 377 U.S. at 433. See also *Bell* v. *Hood*, 327 U.S. 678, 684 (1946); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 396 (1971); *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 424 (1975).

of the proxy rules was *Studebaker Corp.* v. *Gittlin* [290] and the related litigation in Michigan of *Studebaker Corp.* v. *Allied Products Corporation.*[291] The *Gittlin* litigation in New York, and the *Allied* litigation in Michigan, took place contemporaneously and, in both instances, the "insurgent" defendant sought to have the claim under Section 14(a) dismissed on the ground that the corporate target had no standing to bring the action. This claim was rejected in both courts.[292] And the right of a target corporation and its management to bring a private action for violation of Section 14(a) against insurgent shareholders or outsiders in a proxy contest is now so well-established,[293] that in most instances, the question of standing is neither questioned nor discussed.[294]

[290] 360 F.2d 692 (C.A. 2, 1966).

[291] 256 F. Supp. 173 (W.D. Mich., 1966).

[292] The *Gittlin* court in New York held:

> "management has a role to play as such and not merely insofar as the managers are stockholders. Moreover, it is common knowledge that a contest for control may be only the prelude to an arguably damaging transaction to be carried out by the winner with the aid of the corporate proxy machinery or even without further shareholder votes." 360 F.2d at 695.

See also, Greater Iowa Corp. v. *McLendon,* 378 F.2d 783, 794 (C.A. 8, 1967); *General Time Corp.* v. *Talley Indus., Inc.,* 403 F.2d 159, 161 (C.A. 2, 1968); *Bound Brook Water Co.* v. *Jaffee,* 284 F. Supp. 702 (D.N.J., 1968).

[293] See, *e.g., Dillon* v. *Berg,* 326 F. Supp. 1214, 1218 n.2 (D. Del.), *affirmed,* 453 F.2d 876 (C.A. 3, 1971): "The corporation itself has a right to bring a suit for a violation of Section 14(a)" [citing *Gittlin, supra,* and *Talley, supra*].

But, the private right of action established by *Borak,* and particuarly the legislative goals it seeks to implement, extend equally to the insurgent corporate contender engaged in a proxy solicitation for the purpose of displacing incumbent management. While the insurgent is invariably a shareholder of the target company, and its standing to sue for violations of the proxy rules presumably might be justified on that basis, its primary interest in the enforcement of the proxy rules differs from that of the ordinary shareholder-investor. Since the injury resulting to an insurgent from a violation of the proxy rules by incumbent management likely affects the insurgent's plans for a merger or acquisition, the Congressional concern to prevent proxy violations from entrenching incumbent management [295] supports the recognition of the corporate contender's standing to sue in its primary capacity.

The interest which the insurgent proxy contender has in a private right of action is not dependent on, and does not derive from, its status as shareholder, notwithstanding *Borak's* affirmation of its right to bring suit as such. The shareholder-investor most often seeks to preserve the value of his investment;

[294] See, *e.g., Water & Wall Assoc., Inc.* v. *American Consumer Indus., Inc.,* CCH Fed. Sec. L. Rep. ¶ 93,943 (D.N.J., 1973); *Twentieth Century Fox Film Corporation* v. *Lewis,* 334 F. Supp. 1398 (S.D.N.Y., 1971); *Universal Container Corp.* v. *Slade,* CCH Fed. Sec. L. Rep. ¶ 93,005 (S.D.N.Y. 1971).

[295] See, *e.g.,* S. Rep. No. 1455, 73d Cong., 2d Sess. 77 (1934).

to that end, he has an interest in ensuring that the proxy rules are not used to obtain shareholder approval of a transaction that would deplete the corporate assets,[296] put incompetent or self-aggrandizing management in charge,[297] or subject the corporation to liability.[298] On the other hand, the corporation which acquires stock in another company for the purpose of gaining control thereof is interested not in the maintenance of the target in existing form, but in the alteration of the latter's capital structure, management, business, or whatever other element is central to the overall plan.

Union Pacific Railroad Co. v. *Chicago & North Western Railway Co.*,[299] was the first case to recognize the dual status of such an insurgent corporation explicitly, in a suit between two railroad companies arising out of their competing efforts to use the proxy solicitation mechanism to take over a third. In rejecting the contention that Union Pacific should have no private right of action, the court held that

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[296] *Norte & Co.* v. *Huffines*, 416 F.2d 1189 (C.A. 2, 1969) *affirming*, 304 F. Supp. 1096 (S.D. N.Y., 1968).

[297] *Doyle* v. *Milton*, 73 F. Supp. 281 (S.D. N.Y., 1947); *Ohio Drill & Tool Co.* v. *Johnson*, 498 F.2d 186 (C.A. 6, 1974).

[298] *Beatty* v. *Bright*, 318 F. Supp. 169 (1970), *supplemented*, 345 F. Supp. 1188 (S.D. Iowa, 1972).

[299] 226 F. Supp. 400, 406 (N.D. Ill., 1964), cited with approval in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 385 (1970) and in *Electronic Speciality Co.* v. *International Controls Corp.*, 409 F.2d 937, 946 (1969).

> "the Union Pacific has standing sufficient to maintain this action to complain of the alleged violations. It is a joint owner of some 24,000 shares of Rock Island common stock and holds a proxy to vote that stock at the meeting in question. It is also a party to the provisional contract of merger which is to be approved or disapproved at the meeting. *In either capacity, the Union Pacific has a genuine interest in assuring that the merger should not be defeated by prohibited conduct*" (emphasis supplied).

Subsequent cases have recognized the potential injury to a corporate proxy contender from fraudulent solicitation by its opponents in suits which entertained such claims on the merits without finding it necessary to address the standing question directly.[300] The damages which such a corporation stands to suffer, if it sustains its claims on the suits (*viz*: defeat of it merger or acquisition plans) affects it more directly in its capacity as contestant than as shareholder. The difference between the ordinary shareholder and the insurgent proxy contestant has not affected the right of insurgents to maintain private actions under Section 27. While the interests and goals of the two vary, they share a common interest in enforcement of the proxy provisions, since the loss of a proxy contest precipitated by violative conduct

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[300] See, *e.g.*, *U.S. Smelting, Refining & Mining Co.* v. *Clevite Corp.*, CCH Fed. Sec. L. Rep. ¶ 92,691 (N.D. Ohio, 1968); *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (C.A. 2, 1969) and related litigation in *Crane Co.* v. *American Standard, Inc.*, 490 F.2d 332 (C.A. 2, 1973).

is a breach of a duty arising under these provisions. *J. I. Case Co.* v. *Borak*, *supra*, 377 U.S. 426. Since "[t]he legislative history of the Exchange Act indicates that the Congress was concerned with the abuse of proxies by seekers of corporate power as well as by management," [301] if insurgents were unable to contest a proxy solicitation, a curious dichotomy would result: the target corporation and its shareholders could sue competing interests for violations of Section 14(a),[302] but would themselves, be immune from suit by the competing corporation. That would destroy the very equality of opportunity intended to be provided in the proxy provisions. In adhering to this Court's teachings in *Borak* and liberally finding standing to sue for proxy violations, the lower courts have not permitted the essential equality of opportunity in proxy contests to be eroded.

3. *Prior Judicial Determinations Under Section 14(e) of the Williams Act Have Mirrored Actions by the Courts in Providing Private Remedies to Proxy Contestants and Shareholders Necessary to Make Effective the Congressional Purpose in Enacting the Williams Act.*

As we have seen, Congress recognized, in enacting the sweeping provisions of the Williams Act, includ-

[301] Senate Committee on Banking and Currency, *Hearings Before a Subcommittee on S. 879*, 84th Cong., 1st Sess. 1695, 1696 (1956).

[302] See pp. 107-111.

ing Section 14(e), that the predictable consequences would include the implication of private remedies consonant with those provided in the proxy area. The courts have seized upon the protective provisions of the Williams Act, and the general right in Section 27 of the Act to permit private actions by shareholders, target corporations and tender offerors to "make effective the Congressional purpose." *Borak*, *supra*, 377 U.S. at 432; *Cort* v. *Ash*, 422 U.S. 66.

Unlike the proxy regulations, where there exists a statutory scheme which initially appeared to some courts to require deference to the Commission's review of filed material, shareholders seeking to enforce private rights under the Williams Act have not been required to demonstrate Commission approval of, or acquiesence in, a private action. Shareholders who have tendered their securities in response to a tender offer have standing to sue the offeror for either injunctive relief [303] or monetary damages.[304] And, because Section 14(e) does not contain the restricting, "in connection with the *purchase or sale*" language of Section 10(b), nontendering shareholders have been found to have standing to sue both indivi-

[303] See, *e.g.*, *Broder* v. *Dane*, 384 F.Supp. 1312 (S.D. N.Y., 1974).

[304] See, *e.g.*, *Lowenschuss* v. *Kane*, 520 F.2d 255 (C.A. 2, 1975).

dually [305] and derivatively [306] for both injunctive relief [307] and monetary damages [308]—irrespective of the independent standing of the target to sue on its own behalf.[309] Standing has neither been denied to target shareholders suing the target itself [310] nor when seek-

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[305] *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 596 (C.A. 5), *certiorari denied*, 419 U.S. 873 (1974); *Spielman* v. *General Host Corp.*, 402 F. Supp. 190 (S.D. N.Y., 1975), *affirmed*, Docket 75-7538, slip opinion (C.A. 2, July 12, 1976); *McCloskey* v. *Epko Shoes, Inc.*, 391 F. Supp. 1279 (E.D. Pa., 1975); *Petersen* v. *Federated Development Co.*, 387 F. Supp. 355 (S.D.N.Y., 1974).

[306] See, *e.g.*, *Smallwood* v. *Pearl Brewing Co.*, *supra*, 489 F.2d at 596.

[307] See, *e.g.*, *McCloskey* v. *Epko Shoes, Inc.*, *supra*, 391 F. Supp. at 1282; *Petersen* v. *Federated Development Co.*, *supra*, 387 F. Supp. 355.

[308] See, *e.g.*, *Smallwood* v. *Pearl Brewing Co.*, *supra*, 489 F.2d 579; *Spielman* v. *General Host Corp.*, *supra*, 402 F. Supp. 190; *McCloskey* v. *Epko Shoes, Inc.*, *supra*, 391 F. Supp. 1279; *Petersen* v. *Federated Development Co.*, *supra*, 387 F. Supp. 355; *Fabrikant* v. *Jacobellis*, CCH Fed. Sec. L. Rep. ¶ 92,686, (E.D. N.Y., 1970) *Dyer* v. *Eastern Trust and Banking Co.*, 336 F.Supp. 890 (D. Me., 1971).

[309] See *Electronic Specialty Co.* v. *International Controls Corp.*, *supra*, 409 F.2d at 946: "The rights of the nontendering stockholders and the corporation thus seem sufficiently independent to give standing to both under all the provisions added to § 14."

[310] See, *e.g.*, *Neuman* v. *Electronics Speciality Co.*, CCH Fed. Sec. L. Rep. ¶ 92,591 (N.D. Ill., 1969). See also *H. K. Porter Co., Inc.* v. *Nicholson File Co.*, 482 F.2d 421, 423 (C.A. 1, 1973).

ing injunctive or monetary relief from targets and allied offerors.[311]

The standing of a target company to sue the tender offeror under Section 14(e) was also confirmed early in the judiciary's review of the Williams Act. See, *e.g.*, *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937 (C.A. 2, 1969). Those cases reflect a recognition that the target company could well be harmed by the misrepresentations and omissions of a tender offeror. And, while individual shareholders of the target would undoubtedly have a right to sue under the Williams Act for damages to their corporation, it was concluded that the superior resources of the corporation were vitally needed if a timely and effective attack were to be made on illegal offers. *Id.* at 946.

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[311] *Petersen* v. *Federated Development Co.*, *supra*, 387 F. Supp. 355. See also, *Smallwood* v. *Pearl Brewing Co.*, *supra*, 489 F.2d at 598 (footnote omitted):

> "[I]f there is danger that an investor may be misled by management of the target company or the tender offeror in a situation where these two are hostile, there is no reason to assume that the danger will be lessened when both are on the same side of the fence. Indeed, investors would seem to require greater protection in this situation. *Cf. Electronic Specialty Co.* v. *International Controls Corp.*, 2 Cir. 1969, 409 F.2d 937, 946."

Congress also was aware of the need for protection where the tender offer was made by a person friendly to management. See Senate Hearings, p. 144. In those circumstances, the offeror becomes "a member of the coterie which surrounds management." *Id.*

Since 1969, therefore, a target company's standing to seek injunctive relief against a tender offeror for violations of Sections 14(d) and (e) has been accepted universally, often with little or no discussion.[312]

The standing accorded to management is but a reflection of the fact that any private action, whose goal is to redress violations of the Act's provisions, even if motivated by personal or pecuniary interest, will foster the Congressional purpose. In the end, the shareholders will be the beneficiaries of private actions involving violations that the Commission either could not detect, or could not prosecute in a timely fashion. The same reasoning supports standing for defeated offerors.

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[312] *Butler Aviation International, Inc.* v. *Comprehensive Designers, Inc.*, 425 F.2d 842 (C.A. 2, 1970); *Gulf & Western Indus.* v. *Great Atlantic & Pacific Tea Co.*, 476 F.2d 687 (C.A. 2, 1973); *H. K. Porter Co.* v. *Nicholson File Co.*, 482 F.2d 421, 423 (C.A. 1, 1973); *Sonesta International Hotel Corp.* v. *Wellington Assoc.*, 483 F.2d 247 (C.A. 2, 1973); *Ronson Corp.* v. *Liquifin Aktiengesellschaft*, 497 F.2d 394 (C.A. 3, 1974), *affirming*, 370 F. Supp. 597 (D. N.J., 1974); *Copperweld Corp.* v. *Imetal*, 403 F. Supp. 579 (W.D. Pa., 1975); *Texasgulf, Inc.* v. *Canada Development Corp.*, 366 F. Supp. 374 (S.D. Tex., 1973); *MGM, Inc.* v. *Transamerica Corp.*, 303 F. Supp. 1344 (S.D. N.Y., 1969); *Otis Elevator Co.* v. *United Technologies Corp.*, 405 F. Supp. 960 (S.D. N.Y., 1975); *D-Z Investment Co.* v. *Holloway*, CCH Fed. Sec. L. Rep. ¶ 94,771 (S.D. N.Y., 1974). *Commonwealth Oil Refining Co.* v. *Tesoro Petroleum Corp.*, 394 F. Supp. 267, 273 (S.D. N.Y., 1975); *Missouri Portland Cement Co.* v. *Cargill, Inc.*, 498 F.2d 851, 872 (C.A. 2), *certiorari denied*, 419 U.S. 883 (1974); *Cattlemen's Investment Co.* v. *Fears*, 343 F. Supp. 1248, 1252 (W.D. Okla., 1972); *Corenco Corp.* v. *Schiavone & Sons, Inc.*, 498 F.2d 207 (C.A. 2, 1973); *Jewelcor, Inc.* v. *Pearlman*, CCH Fed. Sec. L. Rep. ¶ 95,096 (S.D. N.Y., 1975).

But for offerors, there are other bases as well that the courts have utilized to justify standing to sue for tender offer violations—and those bases are equally productive in light of the Congressional intent underlying Section 14(e). Insurgents, whether shareholders or not (and, as is true here, they usually are), have a definite pecuniary interest in the outcome of the contest. If management is free to violate the Williams Act, but the insurgent, even though that violation redounds to its detriment, cannot maintain a law suit to correct the violation or compensate itself for damages suffered, then the scheme of tender offer regulation Congress so painstakingly sought to create would be little better than a mirage, denying the substantive benefit its remedial provisions were intended to effect, including the benefits intended for shareholders. Worse, if management can sue, as *Borak* and its progeny have held it can, to correct or penalize the insurgent for its violations, but the offeror cannot sue to correct management's violations, then the clearly articulated Congressional intent not to "tip the balance" in a tender offer contest is thwarted, not aided, by the recognition of private remedies—a result this Court surely did not intend in deciding *Borak*, and a result wholly at odds with the Congressional scheme.

Thus, when the question whether a thwarted tender offeror had standing under Section 14(e) to sue a target and its ally was first raised in *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (C.A. 2, 1969), the court commented that

> "The amendment to the Act adding section 14 (e) * * * effective July 29, 1968, subsequent to the events here in question, should serve to resolve any doubts about standing in the tender offer cases, even when an offeror is not, as is Crane, in the position of a forced seller." [313]

The court below followed *Crane's* instruction,[314] as have all other courts *directly* confronted with the issue.[315] Thus, in *Mesa Petroleum Co.* v. *Aztec Oil &*

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[313] 419 F.2d at 798-799. The action in *Crane* was predicated upon Rule 10b-5, since the events in question had occurred prior to the effective date of the Williams Act.

[314] See A. 29-30.

[315] See, *e.g.*, *H. K. Porter Co.* v. *Nicholson File Co.*, *supra*, 482 F.2d 421; *Smallwood* v. *Pearl Brewing Co.*, *supra*, 489 F.2d 579; *Sargent* v. *Genesco, Inc.*, 492 F.2d 750 (C.A. 5, 1974); *Dyer* v. *Eastern Trust and Banking Co.*, *supra*, 336 F. Supp. 890.

There is no support for the isolated *dictum* in *Klaus* v. *Hi-Shear Corp.*, 528 F.2d 225, 232 (C.A. 9, 1975), that "the Williams Act was designed to protect cash tender offerees not offerors." In any event, it appears that, in *Klaus*, the court itself presumed standing and disposed of the action on the appropriateness of the remedy sought. *Id.*, at 232. And the Ninth Circuit's reliance in *Klaus* on this Court's decision in *Rondeau* v. *Mosinee Paper Co.*, 422 U.S. 49 (1975), was seriously misplaced. A careful reading of the Court's decision in *Rondeau* fails to elicit the slightest support for the above-quoted *dictum*. Not only did this Court delimit the issue before it to a determination of the availability of a remedy for an acknowledged violation of Section 13(d)(1) by a failure to file form Schedule 13D, but the Court in *Rondeau* did not consider the issue of standing. It did, however, indicate the "dilemma" which led to the passage of the Williams Act, but did not consider the solution which the Williams Act provides. The Court in *Klaus* neither referred to determinations made

Gas Co., 406 F.Supp. 910 (N.D. Tex., 1976), an offeror sued the target under Section 14(e) for an injunction prohibiting interference with its planned communications to target shareholders and employing false and misleading statements in waging its defense. The target counterclaimed for injunctive relief, and questioned the tender offeror's standing to bring suit under Section 14(e), "since it is not a stockholder of [the target]." 406 F.Supp. at 912 n. 2.

The district court examined the provisions of Section 14(e), and observed that Section "14(e) on its face is a kinsman of the proxy rules. Congress had that kinship in mind when it created the Williams Act." *Id.*, at 913. It was against this "background" as well as the admonitions from this Court in *Borak*, *supra*, 377 U.S. at 433, that the court rejected the challenge to the offeror's standing. Relying upon an opinion of the Fifth Circuit, which had commented that "the right to bring suit has not been limited to tendering offerees but has been extended to numerous other parties who claimed to be victims of 14(e) violations," [316] the court noted that the Fifth Circuit

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by the court below in this case, nor to any of the opinions of the other circuits supporting that decision.

[316] *Sargent* v. *Genesco, Inc.*, 492 F.2d 750 (C.A. 5, 1974). There the court of appeals reversed the district court's determination that plaintiff shareholders were entitled to recovery under Section 14(e) because they had "not alleged any inadequacy of disclosure" made to the offerees-holders of another class of securities, 492 F.2d at 769. But, the court recognized that:

> "Although section 14(e) does not expressly provide for a private right of action, courts have uniformly implied

had, in turn, "cited with approval" the decision of the Second Circuit in this case, as well as that of the First Circuit in *H. K. Porter Co.* v. *Nicholson File Co.*, *supra*, 482 F.2d 421.

In *H. K. Porter Co.*, *supra*, a tender offeror claimed that the target had violated Section 14(e) in communicating its defense to its shareholders. The target challenged the standing of the offeror to maintain an action against it, urging that "Porter's is not the interest which § 14(e) was designed to protect and that therefore we should not imply for it a right of action for damages." 482 F.2d at 423.

In concluding that H. K. Porter Co., the tender offeror, had standing to assert a claim for damages for the violations of the securities laws by the target,

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one. *See Smallwood* v. *Pearl Brewing Co.*, *supra*, 489 F.2d at 596 n. 20. In determining who has standing to sue under 14(e), the quest has been for what will best further the objective of the statute. Consequently, the right to bring suit has not been limited to tendering offerees only but has been extended to numerous other parties who claimed to be victims of 14(e) violations" (citations omitted).

In fact, the court in *Sargent* explicitly cautioned, citing *Dyer* v. *Eastern Trust and Banking Co.*, 336 F. Supp. 890 (D. Me., 1971), "where the court accorded standing to shareholders of the tender offeror," that:

> "we do *not* hold that the plaintiffs in the instant case would have no standing to sue under 14(e) *if there had been misleading statements* in the offer to debenture holders."

492 F.2d at 770 n. 28 (emphasis supplied). See also, *Washburn* v. *Madison Square Garden Corp.*, 340 F. Supp. 504, 509 (S.D. N.Y., 1972).

the First Circuit cogently and compellingly stated its rationale:

> "From the statutory scheme and the legislative history, it seems clear that the overriding purpose of § 14(e) is the protection of the investors. Yet affording for the offeror and the target's management a cause of action for damages would in many instances further that purpose. With an obvious economic stake in the outcome of the tender offer battle, they have the incentive to detect violations and vigorously pursue remedies. * * * *We see no reason why actions by the protagonists in the battle, as well as by the stockholders themselves, would not be effective enforcement weapons.*
>
> "We find further support for this construction when we look to the context in which § 14(e) was enacted. Rule 10b-5 already covered exchanges of stock generally, including tender offers, but rights of action under it were commonly limited to purchasers and sellers. * * * Since § 14(e) substantially tracks the language of 10b-5 except for its omission of the purchase and sale requirement, *it seems reasonable to conclude that its 'major contribution [was] a broader standing to sue—accorded both to the offeror and to the opposition.'*
>
> "Finally, implying for the offeror and the target's management reciprocal rights of action for damages seems only fair given that each has a heavy economic stake, and that each is subject

> to what has been aptly described as 'symmetrical' statutory obligations. * * * Each is victimized when the other commits illegal acts to defeat or accomplish takeover bids."

Id. at 424 (emphasis supplied).

Thus, the necessity of a supplement to Commission action in the tender offer area, as well as prior judicial determinations under the proxy and tender offer provisions of the Act to make effective the intent of the Congress, each demonstrate that the implication of private remedies under Section 14(e) is consistent with the underlying purposes of the legislative scheme. The courts thus have held that, in order to have standing to sue, the plaintiff must be either a participant in the tender offer contest or have a proprietary interest in such a participant.[317] The

[317] See, *e.g.*, *Alaska Interstate Co.* v. *McMillan*, 402 F. Supp. 532 (D. Del., 1975) (standing recognized for competing tender offerors to sue each other); *Emhart Corp.* v. *USM Corp.*, 403 F. Supp. 660 (D. Mass., 1975) *vacated on other grounds*, 527 F.2d 177 (1975) (tender offeror had standing under Section 14(e) to sue target company) *Cauble* v. *White*, 360 F. Supp. 1021 (E.D. La., 1973), *Wulc* v. *Gulf & Western Indus., Inc.*, CCH Fed. Sec. L. Rep. ¶ 95,361 (E.D. Pa., 1975) (employee who had not exercised stock option held not to have standing).

In *Dyer* v. *Eastern Trust & Banking Co.*, *supra*, 336 F. Supp. 890, standing was granted to a shareholder of the tender offeror on the court's reading of the intent of Congress in enacting § 14(e) that "a determination that she has standing is both logical and compatible with the purpose of the statute." To determine who has standing, the "quest must be for what will best accomplish the purposes of the legislature." *Id.* at 914, quoting *Electronic Specialty Co.* v. *International Controls Corp.*, *supra*, 409 F.2d at 946. The *Dyer* court concluded:

> "The purpose of Congress in enacting Section 14(e) was to protect the investing public from harm caused by misleading tender offers. *Shareholders of the offeror are plainly within the class for whom such protection was designed.* Plaintiff is such a shareholder, and effectuation of the Congressional purpose requires that she be granted standing to maintain the present suit" (emphasis supplied).

implication of private actions to offerors furthers the Congressional goal of providing even-handed protection to the various participants in tender offers, and also has a didactic effect in curbing the abuses Congress sought to remedy in enacting the Williams Act.

D. The Williams Act is an Intrusion of Federal Law into the Internal Affairs of Corporations and a Federal Remedy is Appropriate to Effect the Congressional Purpose to Provide Protections to Those Involved in a Tender Offer.

A final factor of importance relied upon by this Court in determining whether to imply a private remedy is whether the action is one traditionally relegated to state law, in an area of basic concern to the states, so that it would be inappropriate to infer a cause of action solely under federal law. *Cort* v. *Ash*, *supra*, 422 U.S. at 78. Here, as in *Borak*, there is a need to imply a private federal remedy, since the Williams Act is a clear intrusion into the internal affairs of corporations and an application of state law might serve to frustrate the Congressional purpose in enacting this federal legislation.

In *Borak*, this Court pointed to the evils inherent in relegating private parties to state law remedies—evils equally present in the tender offer area:

> "[I]f the law of the State happened to attach no responsibility to the use of misleading proxy statements, the whole purpose of the section might be frustrated. Furthermore, the hurdles that the victims might face (such as separate suits, as contemplated by *Dann* v. *Studebaker-Packard Corp.*, [288 F.2d 201], security for expense statutes, bringing in all the parties necessary for complete relief, etc.) might well prove insuperable to effective relief."

Borak, supra, 377 U.S. at 434-435. Committing a tender offeror to state-provided remedies also "might well prove insuperable to effective relief." Thus, only where state statutes exist *and* do not interject hurdles to effective relief should the courts hesitate in implying a private cause of action. *Cort* v. *Ash*, *supra*, 422 U.S. at 66 (1974).[318] In the area of tender offers for publicly-held corporations whose securities are traded in national markets—an area not "basically the concern of" the states (*Cort* v. *Ash*, *supra*, 422 U.S. at 78)—relegating tender offerors to whatever remedies are created by state law would neither be an adequate nor effective means of effectuating the Congressional intent in enacting the Williams Act.

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[318] We have already indicated the inadequacy of nonstatutory state law. See pp. 44-47, *supra*.

Currently, 21 states have statutes regulating tender offers in some respects and, with a single exception,[319] each has been enacted within the past two and a half years.[320] None existed substantially prior to the Williams Act, and most reflect state efforts to counteract the regulatory even-handedness the Williams Act sought to achieve.

Motivated by a desire to protect the management of companies with significant assets or employees in, or contacts with, their states,[321]—but with operations and shareholders in several states—many of these legislative enactments frustrate Congress's clear expression of national policy to allow the forces in contention to have full play and not to "tip the balance" of regulation in favor of management or insurgents.[322] Indeed, state tender offer laws are generally designated to provide a "closed shop" for entrenched management and to neutralize the Congressional

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[319] Virginia's statute was passed almost contemporaneously with the Williams Act. Va. Code Ann. § 13.1-528; eff. March 5, 1968 (3 CCH Blue Sky L. Rep. ¶ 49,228).

[320] New York approved tender offer legislation on July 27, 1976, effective Nov. 1, 1976, N.Y. Bus. Corp. Law § 1600 (2 CCH Blue Sky L. Rep. ¶ 35,351). Bills have been proposed in Louisiana, and Illinois has proposed administrative rules to govern tender offers. Five other states—Iowa, Florida, Missouri, Mississippi and New Jersey—have considered, but not passed, tender offer legislation.

[321] See, *e.g.*, Senate Hearings, p. 59, and Vorys, *Ohio Tender Offer Bill*, 43 Ohio Bar J. 65 (1970).

[322] See discussion at pp. 69-74, *supra*.

policy of even-handedness.[323] Thus, protective state legislation, with its "crazy quilt" pattern of conflicting and inconsistent provisions relating to jurisdiction,[324] procedure,[325] and remedies,[326] seeks to nullify

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[323] *Id.*

[324] A critical infirmity of the emerging pattern of state regulation of tender offers is the conflicting, and often overlapping, jurisdictional provisions of the various statutes. While jurisdiction for most state provisions is predicated upon the presence in the state of the offeree or the target company, see *e.g.* Tenn. Code Ann. § 48-2102(9), eff. March 17, 1976 (3 CCH Blue Sky L. Rep. ¶ 45,192), jurisdictional bases vary widely. Some states rely on the fact that the company is incorporated in the state, Del. Code Ann. Title 8, § 203(c)(2), eff. May 1, 1976 (1 CCH Blue Sky L. Rep. ¶ 11,131); Nev. Rev. Stat. § 78.3765 (1973), or is incorporated *and* doing business in the state, Hawaii Rev. Stat. § 417E-1(5), eff. 1974 (1A CCH Blue Sky L. Rep. ¶ 14,731); Va. Code Ann. § 13.1-529(e), eff. March 5, 1968 (3 CCH Blue Sky L. Rep. ¶ 49,229). Others are less stringent in asserting sufficient jurisdictional contacts requiring only that the target company be incorporated in the state *or* have its principal place of business *and* substantial assets in the state, Alaska Stat. § 45.57.110(4), eff. June 8, 1976 (1 CCH Blue Sky L. Rep. ¶ 6029); Kan. Stat. Ann. § 17-1276(a), eff. June 1974 (1A CCH Blue Sky L. Rep. ¶ 19,351); Ohio Rev. Code Ann. § 1707.041(A)(1) (Page Supp. 1974); Pa. Stat. Ann., eff. March 3, 1976 (2 Blue Sky L. Rep. 41,183); Ky. Rev. Stat. Ann., eff. July 1, 1976 (1A CCH Blue Sky L. Rep. ¶ 20,131). At least one state simply requires that there be either incorporation in the state, *or* that the principal place of business *or* a substantial portion of its assets be located there, see Md. Ann. Code Art. 9, § 11-901(i), eff. July 1, 1976 (1A CCH Blue Sky L. Rep. ¶ 23,421).

[325] Given the present status of state laws regulating tender offers, especially the intended imbalances of most favoring the target company and its management, procedural protec-

tions for the tender offeror are virtually non-existent. Since delays in completing a tender offer usually favor management of the target company, the cooling-off period specified in many state statutes can effectively delay the commencement of an offer for sufficient time to render it effectively inoperative, see, *e.g.*, Hawaii Rev. Stat. 417E-3(f), eff. 1974 (1A CCH Blue Sky L. Rep. ¶ 14,733); Ind. Code § 23-2-3-2(e), (f), eff. May 1975 (1A CCH Blue Sky L. Rep. ¶ 17,152); Ohio Rev. Code Ann. § 1707.041(B)(1)(b).4 (2 Blue Sky L. Rep. ¶ 38,104-1), when coupled with disparate disclosure requirements, see, *e.g.* Alaska Stat. § 45.57.030, eff. June 8, 1976 (1 CCH Blue Sky L. Rep. ¶ 6029B); Colo. Rev. Stat. Ann. § 11-51.5-105, eff. July 1, 1975 (1 CCH Blue Sky L. Rep. ¶ 9155); Hawaii Rev. Stat. § 417E-7, eff. 1974 (1A CCH Blue Sky L. Rep. ¶ 14,737); Ind. Code § 23-2-3-3, eff. May 1975 (1A CCH Blue Sky L. Rep. ¶ 17,153); Idaho Code § 30-1504(1), eff. July 1, 1975 (1A CCH Blue Sky L. Rep. ¶ 15,174); Md. Ann. Code Art. 9 § 11-903, eff. July 1, 1976 (1A CCH Blue Sky L. Rep. ¶ 23,423); Mass. Gen. Laws Ann. Ch. 110C § 5, eff. May 22, 1976 (1A CCH Blue Sky L. Rep. ¶ 24,265); Minn. Stat. § 80B.04, eff. 1973 (1A CCH Blue Sky L. Rep. ¶ 26,214); Pa. Stat. Ann., eff. March 3, 1976 (2 CCH Blue Sky L. Rep. ¶ 41,186); S.D. Comp. Laws Ann. § 47-32-31, eff. 1975 (2 CCH Blue Sky L. Rep. ¶ 44,301); Tenn. Code Ann. § 48-2105, eff. March 17, 1976 (3 CCH Blue Sky L. Rep. ¶ 45,195); Utah Code Ann., eff. Feb. 5, 1976 (3 CCH Blue Sky L. Rep. ¶ 47,335); Va. Code Ann. § 13.1-532, eff. March 5, 1968 (3 CCH Blue Sky L. Rep. ¶ 49,232); Wis. Stat. § 552.07, eff. 1972 (3 CCH Blue Sky L. Rep. ¶ 52,267), and the provision in some states that a state agency must hold a hearing if requested by the target company or ten percent of its shareholders, see, *e.g.*, Mass. Gen. Laws Ann. Ch. 110c92 eff. May 22, 1976 (1A CCH Blue Sky L. Rep. ¶ 24,262); Ind. Code § 23-2-3-2(e), eff. May, 1975 (1A CCH Blue Sky L. Rep. ¶ 17,152); Minn. Stat. § 80B.03(4), eff. 1973 (1A CCH Blue Sky L. Rep. ¶ 26,213); Conn. Gen. Stat. Rev., eff. June 2, 1976 (1 CCH Blue Sky L. Rep. ¶ 10,155; S.D. Comp. Laws Ann. § 47-32-23, eff. 1975 (2 CCH Blue Sky L. Rep. ¶ 44,293). Moreover, ten states confer discretionary authority on a state agency to delay an offer summarily if

the "intrusion of federal law into the internal affairs of corporations" in an area in which Congress

they believe full disclosure is lacking, and Hawaii even allows summary delay if the offer, in the opinion of the state agency, is not fair and equitable to offerees, Hawaii Rev. Stat. § 417E-4, eff. 1974 (1A CCH Blue Sky L. Rep. ¶ 14,734.

[326] Although some state statutes do proscribe conduct either fraudulent or in violation of their tender offer statutes, see, *e.g.*, Md. Ann. Code Art. 9 § 11-904, eff. July 1, 1976 (1A CCH Blue Sky L. Rep. ¶ 23,424); Mich. Comp. Laws § 17, eff. July 1, 1976 (1A CCH Blue Sky L. Rep. ¶ 25,357); Ind. Code § 23-2-3-9(b), eff. May, 1975 (1A CCH Blue Sky L. Rep. ¶ 17,159), they are not consistent in the remedies or penalties provided. Indeed, thirteen of the twenty-one states specify civil remedies and/or penalties for violation by tender offerors, but, consistent with the protectionist tinge to the legislation, make no specific provision for remedies in the event of violations by the target company. See, *e.g.*, Colo. Rev. Stat. Ann. § 11.51.5-106, eff. July 1, 1975 (1 CCH Blue Sky L. Rep. ¶ 9156); Hawaii Rev. Stat. § 417E-9, eff. 1974 (1A CCH Blue Sky L. Rep. ¶ 14,739); Kan. Stat. Ann. § 17-1276, eff. 1974 (1A CCH Blue Sky L. Rep. ¶ 19,351); Ky. Rev. Stat. Ann., eff. July 1, 1976 (1A CCH Blue Sky L. Rep. ¶ 20,136); Mass. Gen. Laws Ann. Ch. 110 C § 9, eff. May 22, 1976 (1A CCH Blue Sky L. Rep. ¶ 24,269); Minn. Stat. § 80B.11, eff. 1973 (1A CCH Blue Sky L. Rep. ¶ 26,221); Ohio Rev. Code Ann. § 1707.041(E) (Page Supp. 1974); Pa. Stat. Ann., eff. March 3, 1976 (2 CCH Blue Sky L. Rep. ¶ 41,193); Tenn. Code Ann. § 48-2112, eff. March 17, 1976 (3 CCH Blue Sky L. Rep. ¶ 45,202); Utah Code Ann. eff. Feb. 5, 1976 (3 CCH Blue Sky L. Rep. ¶ 47,343); Va. Code Ann. § 13.1-539, eff. March 5, 1968 (3 CCH Blue Sky L. Rep. ¶ 49,239); Nev. Rev. Stat. § 78.3774 (1973); Wis. Stat. § 552.21, eff. 1972 (3 CCH Blue Sky L. Rep. ¶ 52,281). Thus, conflicts inconsistencies and procedural and substantive hurdles can effectively tie up an insurgent tender offeror long enough to make the success of its offer highly unlikely, and deny the offeror any effective relief should it attempt to pursue whatever remedies may exist under state law.

has clearly intended to so intrude.[327] Due to the irreconcilably conflicting policies underlying the state and federal legislation, the Congressional purpose and policy embodied in the Williams Act would be hopelessly frustrated if the parties to tender offer contests were relegated to search for remedies in the state courts.[328]

III. ANY LIMITATIONS THE COURTS IMPOSE ON THE MAINTENANCE OF, OR ON THE RELIEF GRANTED UNDER, AN IMPLIED PRIVATE RIGHT OF ACTION, SHOULD EFFECTUATE IMPORTANT PUBLIC POLICY CONSIDERATIONS, AS GLEANED BOTH FROM THE CONGRESSIONAL INTENT UNDERLYING THE STATUTORY BASIS FOR THE IMPLIED PRIVATE ACTION AND FROM THE JUDICIALLY-ENUNCIATED PURPOSES THE IMPLIED REMEDY IS TO SERVE.

Although private actions have been judicially implied under the federal securities laws for thirty

[327] See discussion, *supra*, at pp. 52-69, 83-86.

[328] The question of the constitutionality of state tender offer statutes—as constituting an excessive burden upon interstate commerce—may well be decided in the future, adding uncertainty to the inconsistency and inadequacy of state statutory remedies. See *Thrall Car Mfg. Co.* v. *Rhodes, et al.*, C-2-76-605 (S.D. Ohio); see also, Moylan, *State Regulation of Tender Offers*, 58 Marq. L. Rev. 687 (1975); Note, *Commerce Clause Limitations Upon State Regulation of Tender Offers*, 47 S. Cal. L. Rev. 1133 (1974). Moreover, state tender offer legislation might be pre-empted by the federal statutory scheme. See, *e.g.*, Senate Committee on Banking, Housing and Urban Affairs, *Hearings on Corporate Takeovers*, 94th Cong., 2d Sess. 90, 94 (1976); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); *New York Department of Social Services* v. *Dublino*, 413 U.S. 405 (1973); *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117 (1973). We do not address these questions here, however, since they are not directly at issue in this case.

years,[329] extensive use of implied private actions by plaintiffs seeking civil remedies is of fairly recent vintage.[330] The increased reliance on implied actions under the federal securities laws has necessitated this Court's consideration of the broad parameters of such actions, a consideration which has led this Court to conclude that, just as the federal courts may imply federal remedies under the federal securities laws, so too may they imply limitations on those remedies.[331]

In short, the strong public policy considerations supporting the implication of private actions under the federal securities laws should be balanced only against competing policy considerations of equal strength, where they may exist. If private remedies are utilized or expanded in a manner inconsistent with the legislative scheme, that could encourage vexatious, ill-founded or otherwise inappropriate lawsuits —lawsuits which a reading of the express language of the federal securities laws or their legislative history would show to be at odds with the Congressional purpose. It is these lawsuits which should not be allowed to increase the burden of the courts or result in detriment to the interests of corporate shareholders

[329] *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa., 1946). See also, *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971).

[330] *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975); *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453 (1969).

[331] *Blue Chip Stamps* v. *Manor Drug Stores, supra*, 421 U.S. at 723.

who, along with the consumers of corporate products and services, must ultimately bear the cost of such actions.[332]

In seeking to delimit the scope of implied private actions, however, caution must be exercised to avoid precluding meaningful remedies; for, it is axiomatic that the absence of a meaningful remedy in an implied private cause of action will preclude the utilization of such an action for its intended purposes and make the availability of an implied private remedy meaningless. This Court recognized as much in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 396 (1970), when it awarded interim attorneys' fees to the plaintiffs, whether or not the corporation on whose behalf they sued could ever realize any monetary advantage from the suit, because such plaintiffs who fundamentally

> "vindicat[e] the statutory policy[,] * * * have rendered a substantial service to the corporation

[332] *Blue Chip Stamps* v. *Manor Drug Stores, supra*, 421 U.S. at 739, citing *Securities and Exchange Commission* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (C.A. 2, 1968) (Friendly, J., concurring), *certiorari denied, sub nom., Coates* v. *Securities and Exchange Commission*, 394 U.S. 976 (1969).

Blue Chip Stamps, supra, however, does not require courts to be unduly preoccupied with the possibility of vexatious suits. As this Court held a decade ago, private suits have "played a rather important role in protecting shareholders of corporations from the designing schemes and wiles of insiders who are willing to betray their company's interests in order to enrich themselves." *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363, 371 (1966). This Court there suggested that, in most cases, there might be a need to demonstrate that the plaintiffs "sought to do the corporation * * * injury in [the] litigation," before it would affix the appellation "vexatious" to such suits.

> and its shareholders * * * 'involv[ing] corporate therapeutics'[,] and furnish a benefit to all shareholders by providing an important means of enforcement of the * * * statute."

Accord, Surowitz v. *Hilton Hotels Corp.*, 383 U.S. 363, 371 (1966).

While the limits of implied private actions are an appropriate concern of the courts, at least until Congress should act, the existence of implied remedies has repeatedly been affirmed, even in cases in which it has been deemed appropriate to impose limitations on such suits.[333] Accordingly, the imposition of any limitations on implied private actions should flow from important countervailing considerations, and be imposed only to the extent consistent with Congressional intent. This translates into a series of operative policy objectives which the Commission believes effectuates the basic purpose served by implying judicial remedies under the federal securities laws, while at the same time delimiting the scope of such remedies to avoid unfortunate and unintended consequences.

Thus, in applying delimiting doctrines, this Court has instructed that the starting point is always Congressional intent. Any limitation on an implied ac-

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[333] As this Court noted in *Rondeau* v. *Mosinee Paper Co.*, 422 U.S. 49, 62 (1975): "Of course, we have not hesitated to recognize the power of federal courts to fashion private remedies for securities laws violations when to do so is consistent with the legislative scheme and necessary for the protection of investors as a supplement to enforcement by the Securities and Exchange Commission."

tion under the federal securities laws should be "consistent with the legislative scheme" [334] and not impede or frustrate the purposes which the statutory provision and implied remedy seek to effectuate.[335] And, this is particularly so when private enforcement is a "necessary supplement" to Commission action.[336] But, just as the Court has declined to impose limitations on implied private actions where such limitations would be inconsistent with Congressional purposes, it has limited such private actions where the failure

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[334] *Rondeau, supra*, 422 U.S. at 62; *Cort, supra*, 422 U.S. at 78; *National Railroad Passenger Corp., supra*, 414 U.S. at 458-461; *Barbour, supra*, 421 U.S. at 423-424.

[335] In *Mills* v. *Electric Auto-Lite Co., supra*, 396 U.S. at 382, for example, the plaintiffs alleged that a proxy statement soliciting shareholder support for a merger was materially misleading because it did not divulge the fact that management, which supported the merger, was financially interested in assuring the approval of the merger. The defendants asserted that, irrespective of any material omissions in the proxy statement, the merger was fair. But, the alleged "fairness of the merger" was rejected by this Court as an adequate defense, since such a defense would have "subvert[ed] the congressional purpose of ensuring full and fair disclosure to shareholders." As this Court there explained,

> "The risk that [the plaintiffs] would be unable to rebut the corporation's evidence of the fairness of the proposal, and thus to establish their cause of action, would be bound to discourage such shareholders from the private enforcement of the proxy rules that 'provides a necessary supplement to Commission action.' "

[336] *Borak, supra*, 377 U.S. at 432; *Mills, supra*, 396 U.S. at 382; *Rondeau, supra*, 422 U.S. at 62.

to do so would unreasonably and needlessly expand expressed Congressional motives.[337]

Similarly, the express language of the provision pursuant to which a private action has been implied is a second guide in determining whether, when, and how, to limit implied actions under the federal securities laws.[338] On the other hand, this Court has refused to imply limitations where the proposed limitation was not consistent with the express language of the statute.[339]

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[337] In *Cort* v. *Ash*, *supra*, 422 U.S. at 84, for example, this Court declined to imply a private damage action for corporate shareholders alleging violations of 18 U.S.C. § 610, which prohibits corporate contributions or expenditures in certain elections, upon determining that, unlike the present case, "the remedy sought would not aid the primary congressional goal."

[338] In *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*, 421 U.S. at 733, for example, this Court concluded that the requirement in Section 10(b) of the Securities Exchange Act—that a violation, to be actionable, occur "in connection with the purchase or sale of any security"—by its very terms precluded an implied private action for damages by a person who did not actually purchase or sell any securities. Similarly, in *Ernst & Ernst* v. *Hochfelder*, *supra*, 96 S.Ct. at 1385, this Court implied a scienter limitation on private damage actions under Section 10(b) of the Exchange Act only after determining that the express use of the terms "manipulative," "device," and "contrivance" in Section 10(b) was intended to proscribe knowing or intentional (and possibly reckless), as opposed to merely negligent, misconduct.

[339] In *Mills* v. *Electric Auto-Lite Co.*, *supra*, a major reason for rejecting the "fairness of the merger" as a defense (see n. 335, *supra*), was that "[s]uch a frustration of the congressional policy is not required by anything in the wording of the statute * * *." 396 U.S. at 383. See also, *J. I. Case Co.* v. *Borak*, *supra*, where this Court declined to limit the relief

And, finally, a third guideline for determining whether to limit implied private actions may be derived from the express remedy provisions of the Act. In that context, it is instructive that, in *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*, 421 U.S. at 736, this Court concluded that "[i]t would indeed be anomalous to impute to Congress an intention to expand the * * * bounds it delineated for comparable express causes of action" for judicially-implied causes of action under other sections of the Act. In so holding, this Court was giving effect to the philosophical underpinnings Congress sought to reflect in the express remedy provisions of the Act. As such, where express remedies are indeed "comparable" to remedies judicially implied by the courts, the "bounds * * * delineated" by the Congress in creating express remedies serve as a useful yardstick against which to measure limitations on implied actions.[340] Neverthe-

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available in an implied action under the proxy rules to prospective relief, because the express language of Section 14(a) included the protection of investors, which "certainly implies the availability of judicial relief where necessary to achieve that result." 377 U.S. at 432.

[340] In *Blue Chip Stamps*, *supra*, therefore, this Court limited standing in implied damage actions under Section 10(b) and Rule 10b-5 to actual purchasers or sellers of securities, relying, in part, on the fact that Congress, in amending Section 11 of the Securities Act in 1934, provided that the courts could require an undertaking for expenses in any action under Section 11. Citing the legislative history of this amendment, the Court pointed out that one of the purposes of the amendment was to prevent nuisance or strike suits, and stated that:

"Where Congress in those sections of the 1933 Act which

less, even though express remedies may furnish a useful reference point in delimiting implied private actions, the existence of limitations in the express remedy sections does not necessarily require the imposition of the same, or even a similar, limitation on an action implied under another section of the federal securities laws.[341]

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expressly conferred a private cause of action for damages, adopted a provision uniformly regarded as designed to deter 'strike' or nuisance actions, * * *, that fact alone justifies our consideration of such potential in determining the limits of the class of plaintiffs who may sue in an action wholly implied from the language of the 1934 Act."

Id., at 741.

[341] See, *e.g.*, *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282 (1940), where this Court refused to deny plaintiffs, suing under Section 12(2) of the Securities Act, standing to seek an injunction, even though the statutory remedy expressly referred to in Section 12(2) did not include injunctive relief. As this Court there noted (*id.*, at 288):

> "[S]ection 12(2) states the legal consequences of conduct proscribed by the Act; it does not purport to state the form of action or procedure the claimant is to employ.
>
> "Moreover, in Section 22(a), * * * specified courts are given jurisdiction 'of all suits in equity and actions at law brought *to enforce* any liability or duty created by this subchapter.' The power *to enforce* implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case. If petitioners' bill states a cause of action when tested by the customary rules governing suits of such character, the Securities Act authorizes maintenance of the suit * * *" (emphasis in original).

The foregoing principles, derived largely from the teachings of this Court and sound canons of statutory construction, militate against blackletter law responses to the limitations suggested by the parties for implied private actions under the Williams Act. But, they do serve to order a discussion of the single significant limitation issue raised—the appropriate manner of measuring damages in an implied action under Section 14(e) of the Act.[342]

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[342] Three threshold limitations suggested by the parties seem susceptible of fairly abbreviated disposition.

(1) Relying on this Court's decision in *Blue Chip Stamps* v. *Manor Drug Stores, supra,* it has been suggested that the purchaser-seller limitation on standing to sue under Section 10(b) of the Act, and Rule 10b-5 thereunder, should also be engrafted onto private actions under Section 14(e).

The purchaser-seller limitation on Rule 10b-5 actions was imposed by this Court in *Blue Chip* largely as a result of the precise language of Section 10(b)—that violations occur in connection with "the purchase or sale of any security"—language pointedly not present in Section 14(e). Indeed, the same court that first implied the purchaser-seller limitation for 10b-5 private actions has held that the same limitation does not apply in private actions under the Williams Act, *Electronic Speciality Co.* v. *International Controls Corp.*, 409 F.2d 937, 945 n.6 (C.A. 2, 1969); A-34, and its view in that regard has been followed by every court to consider the question. See, *e.g.*, *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 596 (C.A. 5, 1974), *H. K. Porter Co., Inc.* v. *Nicholson File Co.*, 482 F.2d 421, 424 (C.A. 1, 1973); *Dyer* v. *Eastern Trust & Banking Co.*, 336 F. Supp. 890, 914 (D. Me., 1971). See also, Bromberg, *Securities Law of Tender Offers*, 15 N.Y.L.F. 459, 548-549 (1969). Hamilton, *Some Reflections on Cash Tender Offer Legislation*, 15

N.Y.L.F. 296, 289 (1969); Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 Harv. L. Rev. 1250, 1260 (1973); Note, *The Williams Amendments: An Evaluation of the Early Returns*, 23 Vand. L. Rev. 700, 709-710 (1970). This is consistent with the legislative history underlying the enactment of Section 14(e). It was noted during the hearings that the broad language of the Section was intended to correct the "unsettled state of the law" with respect to the need for a purchase or sale. See House Hearings, p. 59.

Moreover, requiring private plaintiffs to demonstrate that they purchased or sold a security, before they could complain of violations in connection with a tender offer, would deny them many essential protections of the Williams Act—for example, if an offeror received more shares than it requested, but refused to apply the pro-rata acceptance protections of Section 14(d)(6) of the Act to a tendering shareholder; in such a circumstance, the very act complained of would be that the plaintiff could not "sell" or tender securities when it had a statutory right to do so. Like the proxy rules, upon which it was patterned, the Williams Act was meant to govern the *conduct* of contests for corporate control, not simply fraud in the purchase or sale of securities.

(2) It is also suggested that this Court should limit the application of the protections of Section 14(e) of the Williams Act only to cash tender offers, not exchange offers. But, Section 14(e) of the Act, by its express terms applies to "*any* tender offer * * *," and it makes no distinction between cash tender offers and tenders through an exchange of securities. Moreover, the Committee reports on the Williams Act explicitly state that Section 14(e) applies to "any tender offer, whether for cash, securities or other consideration." H.R. Rep. 1711, 90th Cong., 2d Sess. 11 (1968); S. Rep. 550, 90th Cong., 1st Sess. 10-11 (1967). Indeed, before its enactment, the terms of Section 14(e) were moved to a separate subparagraph precisely to ensure that it would apply to

exchange offers as well as cash offers. See p. 63 n. 156, *supra*.

It is possible that persons misled in an exchange tender offer may also fall within the class of persons expressly protected by Sections 11 or 12(2) of the Securities Act, but that fact, if true, would not warrant judicial rewriting of the terms of Section 14(e). Persons who actually tender their shares and have a cause of action under Section 11 of the Securities Act presumably should not also need the protections of Section 14(e); and, in such circumstances, actions brought under Section 14(e) presumably would, in most cases, be subject, by analogy, to the same conditions provided in Section 11. See pp. 149-160, *infra*. *Cf. Ernst & Ernst* v. *Hochfelder*, 96 S.Ct. 1375.

(3) Finally, some of the parties suggest that a prevailing plaintiff in a suit involving violations of the Williams Act should be limited to prospective, injunctive, relief only, and that damage relief should not be available.

But that issue was definitively resolved in *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432-435 (1964), where this Court rejected an identical claim, in part because "the possibility of civil damages" was "a most effective weapon in the enforcement of the proxy requirements," and in part because it is "the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose." *Accord, Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 288 (1940); *Bell* v. *Hood*, 327 U.S. 678, 684 (1946), *Bath Indus. Inc.* v. *Blot*, 427 F.2d 97, 113 (C.A. 7, 1970); *H. K. Porter Co., Inc.* v. *Nicholson File Co.*, 482 F.2d 421, 423 (C.A. 1, 1973); *cf. Rondeau* v. *Mosinee Paper Co.*, 422 U.S. 49, 59 (1975).

Indeed, limiting private parties to prospective injunctive relief may, effectively, limit them to largely illusory remedies. A takeover may occur with great speed so that a court would generally be asked to grant an injunction before all the facts are known. Because a tender offer may be based on financial commitments of a limited duration, a court might well hesitate to enjoin the offer until

The Commission, as a government agency, properly has no interest in the specific *amount* of damages awarded for a proven violation of the Act; its concern is with the *principles* applied in arriving at a computation of damages. To effectuate the purposes of the Act, the manner in which damages are calculated

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complex and difficult questions of fact and law have been resolved. In addition, "once the tender offer has been consummated it becomes difficult, and sometimes virtually impossible, for a court to 'unscramble the eggs.'" *Sonesta International Hotels Corp.* v. *Wellington Associates*, 483 F.2d 247, 250 (C.A. 2, 1973). Since there is nothing in the statutory policy of the Act which "requires the court to unscramble a corporate transaction merely because a violation occurred," *Mills* v. *Electric Auto-Lite Co., supra*, 396 U.S. at 386, a court, in devising the type of restrospective relief which is most appropriate, should "consider the same factors that would govern the relief granted for any similar illegality or fraud." *Id.* at 386. "[M]onetary relief" should always be "a possibility," *Mills, supra*, 396 U.S. at 388. The lower courts have been uniform in awarding damages, where appropriate, in private actions under Section 14(e). See, *e.g., Lowenschuss* v. *Kane*, 520 F.2d 255, 268-269 (C.A. 2, 1975); *H. K. Porter Co., Inc.* v. *Nicholson File Co.*, 482 F.2d 421, 424-425 (C.A. 1, 1973).

Hawaii v. *Standard Oil Co. of Cal.*, 405 U.S. 251 (1972), does not compel a different result. In *Hawaii*, this Court simply held that Section 4 of the Clayton Act, 15 U.S.C. § 15, required a litigant to demonstrate actual injury to its "business or property" before damages could be awarded. The State of Hawaii was permitted to maintain such an action to the extent it could demonstrate such losses in its proprietary capacity, but was not permitted to maintain such a suit, as *parens patriae* for its citizenry, because of an alleged, and rather amorphous injury to its "general economy," 405 U.S. at 264.

should both implement the statutory scheme, and not cause undue disruption in the methods by which persons regulated under the Act carry on their normal business activities.

If damages are denied in the face of truly violative conduct, or, are otherwise inadequate where real injury has been suffered, so as to diminish the likelihood that bona fide private lawsuits will be brought or, conversely, if damages are computed in a Draconian fashion, the principles employed in awarding and measuring damages will not effectuate the Congressional purposes underlying the Act.

On the other hand, awards of damages under the federal securities laws were intended to be compensatory. Section 28(a) of the Securities Exchange Act authorizes the courts to award damages in private actions under the Act to compensate for the "actual damages [sustained] on account of the act complained of," [343] including consequential damages,[344] while punitive and speculative damages have traditionally been viewed as contrary to the intent of Section 28.[345] In

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[343] *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 154-155 (1972); *Simon* v. *New Haven Bd. & Carton Co., Inc.*, 516 F.2d 303 (C.A. 2, 1975); *Wolf* v. *Frank*, 477 F.2d 467 (C.A. 5), *certiorari denied*, 414 U.S. 1065 (1973); *Richardson* v. *MacArthur*, 451 F.2d 35 (C.A. 10, 1971).

[344] *Affilated Ute Citizens* v. *United States*, 406 U.S. 128, 155 (1972); *Janigan* v. *Taylor*, 344 F.2d 781, 786 (C.A. 1), *certiorari denied*, 382 U.S. 879 (1965).

[345] *deHaas* v. *Empire Petroleum Co.*, 435 F.2d 1223 (C.A. 10, 1970); *Myzel* v. *Fields*, 386 F.2d 718 (C.A. 8, 1967), *certiorari denied*, 390 U.S. 951 (1968); *Green* v. *Wolf Corp.*,

measuring damages sustained by a prevailing plaintiff under the Act, the courts most frequently look to the plaintiff's "out-of-pocket" expenses.[346] Similarly, under the Securities Act, punitive damages have been disallowed,[347] and the damages based on limitations provided by Section 11 and 12 of that Act have been, in acordance with their terms, computed to

406 F.2d 291 (C.A. 2, 1968), *certiorari denied*, 395 U.S. 977 (1969); *Simon* v. *New Haven Bd & Carton Co., Inc.*, 516 F.2d 303 (C.A. 2, 1975); *Meisel* v. *North Jersey Trust Co. of Ridgewood*, 216 F. Supp. 469 (S.D. N.Y., 1963); *Schaefer* v. *First National Bank of Lincolnwood*, 326 F. Supp. 1186 (N.D. Ill., 1970), *appeal dismissed*, 465 F.2d 234 (C.A. 7, 1972); *In Re Caesars Palace Securities Litigation*, 360 F. Supp. 366 (S.D. N.Y., 1973). See *Wolf* v. *Frank*, 477 F.2d 467 (C.A. 5, 1973), *certiorari denied*, 414 U.S. 975 (1973).

On the other hand, as this Court has held, where a defendant-buyer has received more than the plaintiff-seller's actual loss, "damages are the amount of the defendant's profit." *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 155 (1972). *Accord, Janigan* v. *Taylor*, 344 F.2d 781, 786 (C.A. 1), *certiorari denied*, 382 U.S. 879 (1965).

[346] See e.g. *Abrahamson* v. *Fleschner*, 392 F. Supp. 740 (S.D. N.Y., 1975), *appeal pending*, Docket No. 75-7203 (C.A. 2); *Schaefer* v. *First National Bank of Lincolnwood, supra*, 326 F. Supp. 1186; *Tucker* v. *Arthur Andersen & Co.*, 67 F.R.D. 468 (S.D. N.Y., 1975).

[347] See, *e.g., Hill York Corp.* v. *American International Franchises, Inc.*, 448 F.2d 680, 697 (C.A. 5, 1971); *Globus* v. *Law Research Service, Inc.*, 418 F.2d 1276, 1284-1287 (C.A. 2, 1969), *certiorari denied*, 397 U.S. 913 (1970); *Green* v. *Wolf Corp., supra*, 406 F.2d at 303; Hirsch & Lewis, *Punitive Damages Under the Federal Securities Acts*, 47 Notre Dame L. Rev. 72 (1971). But see, *Nagel* v. *Prescott & Co.*, 36 F.R.D. 445, 449 (N.D. Ohio, 1964) suggesting that exemplary damages are not excluded under Section 12(2), "upon a proper showing of maliciously improper conduct;" *Berley* v. *Dreyfus & Co.*, 43 F.R.D. 397, 399 (S.D. N.Y., 1967) (*semble*).

compensate successful plaintiffs for the actual damages they have sustained.[348]

A careful balancing of the several factors which play a role in the resolution of these competing policy considerations is required to harmonize the prior teachings of this Court with the need to fashion appropriate relief to remedy violations of the Williams Act.

In considering the measure of damages in implied private actions, this Court has repeatedly made clear the fact that questions of relief and liability should be treated separately under the Securities Exchange Act, and that a separate standard of causation should be applied to each. Thus, in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. at 384-385, it was held that causation, for the purpose of liability, may be established as a matter of law once the materiality of a misleading statement or omission had been established. Mr. Justice Harlan, writing for a unanimous Court on this point, stated:

> "Where the misstatement or omission in a proxy statement has been shown to be material, * * * that determination itself indubitably embodies a conclusion that the defect was of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote. This re-

[348] 15 U.S.C. 78k and 78*l*; See, *e.g., Kramer* v. *Scientific Control Corp.*, 365 F. Supp. 780 (E.D. Pa., 1973); *Goldman* v. *Bank of Commonwealth*, 332 F. Supp. 699 (E.D. Mich., 1971), *affirmed*, 467 F.2d 439 (C.A. 6, 1972); *Hirsch & Lewis, supra.*

quirement that the defect have a significant *propensity* to affect the voting process is found in the express terms of Rule 14a-9, and it adequately serves the purpose of ensuring that a cause of action cannot be established by proof of a defect so trivial, or so unrelated to the transaction for which approval is sought, that correction of the defect or imposition of liability would not further the interests protected by § 14 (a).

There is no need to supplement this requirement with a requirement of proof of whether the defect actually had a decisive effect on the voting. *Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself * * * was an essential link in the accomplishment of the transaction.*" [349]

Similarly, in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 154 (1972), this Court unanimously held that the "withholding of a material fact establish[es] the requisite element of causation in fact" to make out a cause of action under Rule 10b-5; and, in *TSC Indus., Inc.* v. *Northway, Inc.*, 96 S. Ct. 2126, 2130 (1976), it was held that "[s]o long as the misstatement or omission was material, the causal

[349] (Emphasis supplied.) In *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 431 (1964), this Court held that a private right of action "exists as to both derivative and direct" claims, even before a "causal relationship" had been established between the violation alleged and the injury claimed.

relation between violation and injury is sufficiently established'." [350]

However, *Mills* was careful to separate the two very different contexts in which "causation" arises: (i) causation for purposes of determining the existence of a cause of action—that is, liability, and (ii) damages causation. As to the latter, the Court made clear:

> "Our conclusion that petitioners have established their case by showing that proxies necessary to approval of the merger were obtained by means of a materially misleading solicitation implies nothing about the form of relief to which they may be entitled."

396 U.S. at 386.

[350] And see, *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975). Just as causation may be established by the materiality of the misstatements or omissions in proxy or tender offer materials, so too may reliance. In *Ute, supra*, this court held that "positive proof of reliance [on material misrepresentations] is not a prerequisite to recovery. All that is necessary is that the facts withheld be material * * *." 406 U.S. at 153-154. See also *Mills, supra*, 396 U.S. at 382 n. 5; *TSC, supra*, 96 S. Ct. at 2132 n. 9, to the effect that "positive proof of reliance is not necessary when materiality is established."

The practical necessity of deducing reliance from materiality rather than requiring actual proof of reliance was explained by Mr. Justice Harlan in *Mills*:

> "Proof of actual reliance by thousands of individuals would, as the [lower] court acknowledged, not be feasible, * * * and reliance on the *nondisclosure* of a fact is a particularly difficult matter to define or prove * * * (citations omitted, emphasis in original).

396 U.S. at 382 n. 5.

After considering "[p]ossible forms of relief," 396 U.S. at 386, the Court concluded that "damages should be recoverable only to the extent that they can be shown," 396 U.S. at 389, and remanded the case for further proceedings on the damages question. Indeed, "*Mills* could not be plainer in holding that the questions of liability and relief are separate in private actions under the securities laws, and that the latter is to be determined according to traditional principles," *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 64 (1975).

Application of the *Mills-Ute-TSC* objective standard of liability causation to Section 14(e) follows logically from the intent of the Congress to establish under the tender offer provisions a scheme of regulation parallel to that existing under the proxy provisions.[351] As Mr. Justice Harlan noted in *Mills*, the objective test "avoid[s] the impracticalities," of proving injury and, "by resolving doubts in favor of those the statute is designed to protect, will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions." 396 U.S. at 385. This rationale is equally applicable to actions brought for violations of Section 14(e), since that Section was designed to protect each of the parties participating in, or affected by, tender offer contests.[352] Causation, therefore, should be presumed, as was done by

[351] See, pp. 52-54, *supra*.

[352] See discussion at pp. 69-74, *supra*.

the Court of Appeals below[353] for the purposes of establishing liability under Section 14(e) where material misstatements or omissions have been shown.

But, as was held in *Mills*, *supra*, 396 U.S. at 389, and noted in *Rondeau*, *supra*, 422 U.S. at 64, "damages should be recoverable only to the extent that they can be shown." The presumption of causation from materiality, consequently, does not automatically entitle a private plaintiff to monetary damages—a causal connection between the material misstatement or omission on the one hand, and the consequences complained of on the other, must be demonstrated. Thus, while the court below, having properly found material misstatements and omissions,[354] properly presumed causation to establish liability[355] (A. 55-63), the

[353] See A. 55-63.

[354] See *TSC Indus., Inc.* v. *Northway, Inc.*, 96 S. Ct. 2126, 2130-2131 (1976).

[355] The Court of Appeals below held:

> "[T]he fact that CCI was not directly deceived is what makes application of the *Mills-Ute* test appropriate and essential. It would be unduly burdensome to require an offeror to prove actual reliance when, as here, there are numerous shareholders who undoubtedly possess a wide range of expertise and knowledge. It would be impractical to require CCI to prove that each individual Piper shareholder who failed to trade for CCI's stock, or who traded for BPC's stock, relied upon defendants' misrepresentations in doing so. These impracticalities are avoided by establishing a presumption of reliance where it is logical to presume that reliance in fact existed. *Kohn* v. *American Metal Climax, Inc.*, *supra*, 458 F.2d at 288-

plaintiff here should be allowed to recover only those damages shown to have been caused by the violative conduct. For, as Judge Friendly stated in *Crane Co.* v. *American Standard, Inc.*, 490 F. 2d 332, 334 (C.A. 2, 1973):

> "Quite conceivably a judge * * * might find the chain of causation so dubious and the task of determining damages so elusive as to lead him to decide that, except for some items that may be readily provable, he could not properly award anything save perhaps attorneys' fees."

Beyond the question of causation, federal courts, in exercising their power to "make effective the right of recovery afforded by the Act," [356] cannot ignore the fact that the Williams Act, as part of the Securities Exchange Act, subjects injured plaintiffs to the limitations on recovery the Act generally provides in Section 28(a)—"actual damages on account of the Act complained of." [357]

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291. As we have stated above, § 14(e) was designed to protect offerors from unfair and unlawful opposition. By 'resolving doubts in favor or those the statute is designed to protect,' *Mills* v. *Electric Auto-Lite Co., supra*, 396 U.S. at 385, we are implementing congressional intent not only to protect investors, but to make sure that contests for control between offerors and incumbent management, or other offerors, shall proceed fairly." (A. 59-60).

[356] *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 288 (1940). *Accord, J. I. Case Co.* v. *Borak*, 377 U.S. 426, 433-434 (1964).

[357] 15 U.S.C. 78bb. That damages may be awarded for Williams Act violations has not been doubted by the lower courts. See, *e.g., Lowenschuss* v. *Kane*, 520 F.2d 255, 268-269 (C.A. 2, 1975); *H. K. Porter Co., Inc.* v. *Nicholson File Co.*, 482 F.2d 421, 424-425 (C.A. 1, 1973).

Sections 14(e) and 28(a), moreover, are but two provisions of the Securities Exchange Act which, along with the Securities Act, "constitute interrelated components of the federal regulatory scheme governing transactions in securities." *Ernst & Ernst* v. *Hochfelder, supra*, 96 S. Ct. at 1387; *Blue Chip Stamps, supra*, 421 U.S. at 727-730. Accordingly, as this Court has noted, "the interdependence of the various sections of the federal securities laws is certainly a relevant factor in any interpretation of the language Congress has chosen * * *." *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453, 466 (1969); *Hochfelder, supra*, 96 S. Ct. at 1388-1389. In accordance with this teaching and because the instant case involves misleading statements in a registration statement and prospectus filed in connection with an exchange tender offer,[358] the express civil liability sections of the Securities Act should be considered in determining the appropriate relief to be granted here.[359]

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[358] See A. 15-18.

[359] As a threshold proposition, it seems self-evident that the courts may, on an *ad hoc* basis, limit the relief available in a private action under the Williams Act where the Commission has obtained relief in its own enforcement action which restores all injured persons to their status quo ante, or otherwise makes them whole. While the Commission may not institute its own lawsuit to vindicate purely individual grievances, see, *e.g., Federal Trade Commission* v. *Klesner*, 280 U.S. 19 (1929), when the Commission does bring suit, it may

seek remedies that are ancillary to its traditional injunctive relief, including the disgorgement of profits unlawfully obtained by wrongdoers and the creation of a pool of funds to compensate the victims of a fraud. See, *e.g., Securities and Exchange Commission* v. *Manor Nursing Centers, Inc.* 458 F.2d 1082 (C.A. 2, 1972); *Securities and Exchange Commission* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301 (C.A. 2, 1971); *Securities and Exchange Commission* v. *Bowler*, 427 F.2d 190, 197-198 (C.A. 4, 1970); *Securities and Exchange Commission* v. *Bartlett*, 422 F.2d 475, 477-478 (C.A. 8, 1970); *Los Angeles Trust Deed & Mortgage Exchange* v. *Securities and Exchange Commission*, 285 F.2d 162, 181-182 (C.A. 9, 1960); *Securities and Exchange Commission* v. *Aldred Investment Trust*, 151 F.2d 254 (C.A. 1, 1945). Such relief is sought by the Commission to effectuate the purposes of the federal securities laws, and is a proper exercise of the equity powers of a federal court. *Securities and Exchange Commission* v. *Texas Gulf Sulphur Co., supra*, 446 F.2d at 1308.

And, where the Commission obtains injunctive and other equitable relief, such a result conceivably could, as well, redress in whole or in part injuries suffered by private litigants. Since private actions are implied under the federal securities law, at least in part, to "supplement" Commission enforcement action, the effects of the award of such remedies in Commission actions should be considered before a damage award is made in a private action.

In the instant case, for example, the Commission obtained a judgment requiring Bangor Punta to make a rescission offer to all of the Piper shareholders who had tendered their shares during the period in which the misleading Bangor Punta prospectus was in circulation (D-16). Thus, the District Court attempted to remedy the misleading registration statement and prospectus by restoring the Piper shareholders to the status quo ante violation. Had no other violations occurred, and, if Chris-Craft were unable to sustain a showing that it had suffered damages, no further award of relief would be necessary. The Commission, however, in seeking disgorgement of illegal profits, cannot always effect an award of monies in an amount equal to the actual damages suffered by the parties to a transaction, and, therefore, it is likely that there will be many situations where private damage actions will be necessary

Sections 11, 12 and 15 create express civil liabilities under the Securities Act.[360] Each of these sections "allow[s] recovery for negligent conduct," *Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. at 1388. Section 11, for example, claimed by First Boston here as a limitation on its liability, "unambiguously creates a private action for damages when a registration statement includes untrue statements of material facts or fails to state material facts necessary to make the statements therein not misleading," *Hochfelder, supra*, 96 S. Ct. at 1388. Similarly, Section 12 "creates potential civil liability for a seller of securities in favor of the purchaser for misleading statements or omissions in connection with the transaction," *id.*, at 1338 n. 27. Unlike Section 28(a) of the Securities Exchange Act, however, Sections 11 and 12(2) specify precise damage measurements to be applied.

Since both Section 11 and Section 12 of the Securities Act explicitly provide for recovery where

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to complement Commission actions, see, *e.g.*, Ruder, *Texas Gulf Sulphur—The Second Round*, 63 N.W. L. Rev. 423, 429 (1968).

[360] Section 11 of the Securities Act establishes express civil remedies for false or misleading registration statements. Section 12 of the Act establishes express civil remedies for false or misleading prospectuses or oral communications. Section 15, relating to "control" persons, is not relevant for the purposes of this discussion, although the reasoning herein should be equally applicable in a Section 15 action, 96 S. Ct. at 1388 n. 27.

conduct is merely inadvertent or negligent,[361] and since violations of these sections may also amount to violations of the Securities Exchange Act,[362] the question arises whether recovery for wrongs that are violations of both acts are necessarily limited by the express civil remedy provisions of the Securities Act. Limitations on recovery in these express civil remedy provisions provide an apt analogy for measuring damages resulting from negligent or inadvertent violations of the Securities Exchange Act. Where there is added the ingredient of fraud, however, the limitations on recoveries under the Securities Act should not be applied by analogy to suits for violations under the Securities Exchange Act, even if the suit could also have been maintained under the Securities Act.

Judge Jerome Frank first decided this issue twenty-five years ago, in *Fischman* v. *Raytheon Manufacturing Co.*, 188 F. 2d 783, 786-787 (C.A. 2, 1951). Writing for a unanimous panel of the Court

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[361] *Ernst & Ernst* v. *Hochfelder, supra,* 96 S. Ct. at 1388; *Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 783 (C.A. 2, 1951); *Unicorn Field, Inc.* v. *Cannon Group, Inc.*, 60 F.R.D. 217 (S.D. N.Y., 1973); *Phillips* v. *Alabama Credit Corp.*, 403 F.2d 693 (C.A. 5, 1968); *Johns Hopkins University* v. *Hutton*, 297 F. Supp. 1165 (D. Md., 1968), *affirmed in part, reversed in part*, 422 F.2d 1124 (C.A. 4, 1970); *Wilko* v. *Swann*, 127 F. Supp. 55 (S.D. N.Y., 1955).

[362] See, *e.g.*, *Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 783 (C.A. 2, 1951); *Matheson* v. *Armbrust*, 284 F.2d 670 (C.A. 9, 1960); *Ellis* v. *Carter*, 291 F.2d 270 (C.A. 9, 1961); *Orn* v. *Eastman Dillon, Union Securities & Co.*, 364 F. Supp. 352 (C.D. Cal., 1973).

of Appeals for the Second Circuit, Judge Frank held that suits under Section 10(b) of the Securities Exchange Act could be brought "free of the restrictions" applicable to a suit under Section 11 of the Securities Act:

> "We think that when, to conduct actionable under § 11 of the 1933 Act, there is added the ingredient of fraud, then that conduct becomes actionable under § 10(b) of the 1934 Act and [Rule 10b-5] at the suit of any defrauded person, whether or not he could maintain a suit under § 11 of the 1933 Act.
>
> "Were this not true, Section 11 of the 1933 Act, designed to protect investors even where there is no fraud, would afford a shelter or sanctuary for those who defraud investors" (footnote omitted).

Cf. McClure v. *Borne Chemical Co.*, 292 F. 2d 824 (C.A. 3, 1961); *Donlon Indus. Inc.* v. *Forte*, 402 F. 2d 935 (C.A. 2, 1968) (Friendly, J.); *Ellis* v. *Carter*, 291 F. 2d 270 (1961); *Matheson* v. *Armbrust*, 284 F. 2d 670 (1960). Knowing wrongdoers, in sum, should not be able to find "shelter or sanctuary" in the express limitations on liability set forth in the Securities Act to protect against inadvertent misleading statements.[363] Thus, if First Boston,

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[363] *Cf. Herzfeld* v. *Laventhal, Kreckstein, Horwath & Horwath*, CCH Fed. Sec. L. Rep. ¶ 95,660 (C.A. 2, July 15, 1976); *Bailey* v. *Meister Brau, Inc.*, CCH Fed. Sec. L. Rep. ¶ 95,543 (C.A. 7, May 6, 1976); *Gould* v. *American-Hawaiian Steamship Company*, CCH Fed. Sec. L. Rep. ¶ 95,512 (C.A. 3, April 8, 1976); and *United States* v. *Charnay*, CCH Fed. Sec. L. Rep. ¶ 95,560 (C.A. 9, May 7, 1976), *petition for rehearing en banc denied* (C.A. 9, July 8, 1976).

[Footnote continued on page 154]

Bangor Punta or the Pipers made knowing misstatements in connection with sales of securities, the limitations on recovery under the Securities Act should not, by analogy, be applied to limit the relief that Chris-Craft can obtain from them under Section 14(e).[364]

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[363] [Continued]

If liability for violations of the Securities Exchange Act were limited to the same amounts recoverable under the Securities Act when both Acts are violated, it would be possible for the perpetrators of a fraud to calculate, in accordance with the precise damage provisions of Sections 11 and 12 of the latter Act, the maximum amount of their liability and thus the maximum risk to which their knowing fraud, if uncovered, would expose them. But such a result is contrary to the entire purpose of the Securities Act. Moreover, it is apparent that "actual damages" to the victim of such a knowing fraud might far exceed the amount recoverable under the Securities Act, a burden that the wrongdoer, not his victim, appropriately should bear.

[364] As the above analysis suggests, "scienter," *i.e.*, "a mental state embracing intent to deceive, manipulate or defraud," *Ernst & Ernst* v. *Hochfelder*, 96 Sup. Ct. 1375, 1381 n. 12, is not a necessary element to establish entitlement to damages in a cause of action pursuant to Section 14(e). Damages may be limited by analogy to Sections 11 and 12 of the Securities Act if the conduct of the parties here was inadvertent or merely negligent. By the same token, damages may be awarded in accordance with Section 28(a) of the Securities Exchange Act against the knowing violator.

The statutory language of Section 14(e)—"the starting point in every case involving the construction of a statute," *Blue Chip Stamp* v. *Manor Drug Stores*, 421 U.S. at 756 (Powell, J., concurring)—is in itself ample indication that Congress intended to proscribe strictly inadvertent, misleading statements and omissions: The Section is drafted in the disjunctive, it directly prohibits failures to disclose and it specifically proscribes the making of "untrue" statements. This Court intimated as much in *Ernst & Ernst* v.

Conversely, however, where conduct is merely negligent or inadvertent, the Securities Act limitations on liability appropriately, by analogy, may be applied. Thus, if this Court were to find that Bangor Punta or the Pipers made false and misleading statements in connection with the sale of Bangor Punta or Piper securities, but that such statements were made inadvertently, by analogy the limitations on recovery

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Hochfelder, supra, when it examined the language of Rule 10b-5, which is followed almost word for word in the language of Section 14(e), and concluded:

> "Viewed in isolation the language of subsection (2), and arguably that of subsection (3), could be read as proscribing, respectively, any type of material misstatement or omission, and any course of conduct, that has the effect of defrauding investors, whether the wrongdoing was intentional or not."

96 S. Ct. at 1390.

In addition, the legislative history unmistakably indicates that Congress was concerned with "inaccurate or incomplete" information and presentations, see, *e.g.*, 112 Cong. Rec. 19003 (1966), Senate Hearings, pp. 17, 19, 20, 28, 31, 35, 38, 98-99, 125, 159, 178, 196, 210; Senate Report, 10-11; House Hearings, pp. 17, 59; and was aware that the Section as drafted would not require proof of fraud, Senate Hearings, p. 196. See also, *id.*, pp. 125, 159 and 178. Moreover, since an intent to deceive, manipulate, or defraud is not, and has not been, required to establish violations of Rule 14a-9, adopted pursuant to Section 14(a) of the Exchange Act, see, *e.g., Richland* v. *Crandall*, 262 F. Supp. 538 (S.D. N.Y., 1967); *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F. 2d 1281 (C.A. 2, 1973) (Friendly, J.); *Gould* v. *American Hawaiian Steamship Company*, 523 F. 2d 761 (C.A. 3, 1976), and, since the relevant portion of Section 14(e) is substantially identical to Rule 14a-9, see Senate Hearings, pp. 140-141, such an intent should not be required to establish a violation of Section 14(e). But *cf. Gerstle* v. *Gamble-Skogmo, Inc., supra,* 478 F. 2d at 1299 n. 17.

in Section 12(2) of the Securities Act might be applied. Similarly, if this Court were to find that First Boston acted as an underwriter and nothing more, and that its conduct with regard to the misleading registration statement was merely inadvertent or negligent, it would be proper to apply, by analogy, limitations on relief similar to those in Section 11 in assessing damages against it.[365]

[365] The court of appeals found that First Boston "had an obligation with respect to the [Bangor Punta] exchange offer to reach a careful, independent judgment" (A. 51) and that First Boston was "duty bound to make a reasonable further investigation" (A. 51), if a suggestion arose that the exchange offer materials were deceptive (A. 51). Further, it explicitly held that "First Boston did not adequately perform its duty," (A. 51) and that its conduct "went far beyond mere negligence" (A. 54) and "amounted to an almost complete abdication of its responsibilities". (A. 55).

The district court, by contrast, failed to perceive the independent duty of First Boston. It found that First Boston "acted solely in furtherance of what [it] believed in good faith to be the legitimate interests of [its] clients" (A. 159). Thus, while the court of appeals analyzed First Boston's liability in terms of negligence and the breach of its duty as an underwriter, the district court conducted its analysis from the premise that First Boston was not to be "responsible or liable for the action of its clients" (A. 159) in the absence of "fraud or deceit" (A. 158).

It is the Commission's view that the premise from which the court of appeals began its inquiry was the correct one. The appellate court properly observed that:

> "An underwriter by participating in an offering constructively represents that statements made in the registration materials are complete and accurate. The investing public properly relies upon the underwriter to check the accuracy of the statements and the soundness of the offer; when the underwriter does not speak out, the investor reasonably assumes that there are no undisclosed material deficiencies" (A. 50).

Reliance on Section 11 limitations on recovery, however, is fundamentally misplaced if an investment banker serves in the dual capacity of underwriter *and* dealer-manager. The role of the dealer-

Consequently, an underwriter has a duty to act diligently in performing its function and to inquire when it is "aware of facts that strongly [suggest], even though they [do] not conclusively show, that * * * registration materials [are] deceptive" (A. 51). Because First Boston did not conduct such an inquiry here, although it had reason to believe that Bangor Punta's registration statement might be deceptive, First Boston breached its duty as an underwriter and consequently may properly be found, on the present record, at least liable in accordance with the minimal liability provisions of Section 11. Thus, the judgment of the court of appeals as against First Boston should be affirmed insofar as it compensates Chris-Craft in accordance, by analogy, with Section 11 of the Securities Act.

The remaining issue is whether First Boston's liability should extend beyond the limitations provided by Section 11 to compensate Chris-Craft for its actual damages as provided by Section 28(a) of the Securities Exchange Act. Since our reading of the lower court opinions in this case indicates that the district court made no findings of fact and drew no conclusions of law regarding the extent of First Boston's culpability in terms of breach of its independent duty as an underwriter, we cannot say, as did the court of appeals, whether, as a matter of law, First Boston's conduct was more than negligent.

Such a determination should be made, in the first instance, by a district court inquiring into that question. Accordingly, the Commission believes it appropriate for this Court to vacate that portion of the order of the court of appeals that imposes liability upon First Boston exceeding that provided, by analogy, under Section 11, and remand the cause for hearing on the question of whether First Boston was more than negligent.

manager, discussed *supra* at pages 38-41, may be significantly different from the role of a mere underwriter of a registered securities offering. The dealer-manager of an exchange tender offer often serves as the "acknowledged general" and principal adviser to the offeror and undertakes responsibility for the soundness of the transaction and the accuracy of the disclosures not only in the offering but in the full panoply of materials used in the attack or defense. In these instances, it is compensated not as an independent underwriter but rather as the offeror's ally, actively participating in the tender offer contest. In addition, it usually receives benefits from the offeror in the form of additional fees which the other underwriters and soliciting dealers do not receive.[366] Where these differences between a traditional underwriter and a dealer-manager exist, it would be inappropriate to apply, by analogy, the liability limitations of Section 11 to an investment banker serving in a dual capacity as underwriter and dealer-manager.[367]

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[366] It should be noted that Section 11(e) provides that an underwriter's liability is limited only when the underwriter receives, in proportion to the amount of securities underwritten, no greater benefit than other underwriters. Therefore, an underwriter who does receive additional fees from the issuer could be held liable under Section 11(e) for damages exceeding the public offering price of the securities he has directly underwritten. See also, *supra*, pp. 39-41.

[367] The legislative history establishes that Congress specifically chose not to extend the benefits of Section 11 limitations on liability to persons who violate Section 14(e). Senate Hearings, pp. 112, 164; see also, p. 63 n. 156, *supra*.

There could be situations, however, where the misleading prospectus of tender offeror A induces a stockholder to tender his securities in exchange for A's securities instead of tendering them for an offer of B, where the damages of the tendering stockholder might exceed the liability limitations of Section 11.

Here, both the district court and the court of appeals "agree[d]" that, "based on substantial evidence," First Boston, "in its capacity as investment banker * * * merely provided professional services to [Bangor Punta and Piper]," A. 55 n.25. The business decisions that led to violations of the securities laws were initiated by these companies, "not by First Boston in its role of investment banker," *id.* Assuming that First Boston did not act knowingly, these findings of its limited role, if not clearly erroneous, would permit this Court to conclude that First Boston's conduct was more analogous to that of a traditional underwriter and not to that of the usual dealer-manager, and for the application, by analogy, of limitations on damages in Section 11 of the Securities Act.

Moreover, the limitation placed on an underwriter's liability under Section 11 of the Securities Act simply recognizes that the loss suffered by a defrauded purchaser will presumably not exceed the price he paid for the securities. In contrast, the losses incurred by an unsuccessful contestant for corporate control as a result of the misleading practices of a competing tender offeror's dealer-manager may well exceed the total price at which the competitor's securities were offered. In such instances, there is nothing in the Securities Exchange Act that bars the award of fully compensatory damages to the injured tender offeror

for violations of Section 14(e). Certainly from an equitable standpoint, the cost of any actual damage should be borne by the wrongdoer rather than his victim.

Where, however, multiple defendants are found liable for violations of the Securities Exchange Act, a court, in order to reach a more equitable result, may choose to apportion damage liability among the various violators by reference to the extent that each might have profited by the violations, or by reference to the degree of culpability of each defendant,[368] or some combination of these considerations. For example, the court might require defendants who have actively and directly violated the statute, or have done so knowingly, to pay a greater portion of the judgment than those defendants who have been passive violators.[369]

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[368] *Cf.* Section 11(f) of the Securities Act of 1933, 15 U.S.C. 77k(f), which provides for joint and several liability and for contribution on behalf of persons who have become "liable to make any payment" under Section 11 "unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation."

[369] This is consistent with Section 11(f) of the Securities Act. In the instant action, First Boston and the insiders are free to assert the doctrines of contribution and possibly indemnification from other defendants in a separate proceeding, see *e.g.*, *de Haas* v. *Empire Petroleum Co.*, 286 F. Supp. 809, 815-816 (D. Colo., 1968) *affirmed in part and vacated in part*, 435 F. 2d 1223 (C.A. 10, 1970); *Globus* v. *Law Research Serv., Inc.*, 418 F. 2d 1276, 1287-1289 (C.A. 2, 1969), *affirming* 287 F. Supp. 188 (S.D.N.Y., 1968), *certiorari denied*, 397 U.S. 913 (1970). Whether damages should be apportioned has not been litigated and is not before the Court at this time.

Assuming that this Court should conclude that it is appropriate here to award actual damages for violations of the Williams Act, and that such actual damages have been shown, the Commission limits its concern only to the principle that the damages awarded should be sufficient to compensate an injured party to the full extent of its injury. This is so because the Commission must rely upon private parties to "supplement" its own enforcement actions, and that function only will be assured if the damages that are awarded are sufficient to compensate any injured party to the full extent of its loss.[370]

Of course, in circumstances such as these, the operative question is what constitutes the full extent of an injured tender offeror's injury. The district court believed the injury to be compensated was Chris-Craft's lost "opportunity to gain control" of Piper (B. 52). The court of appeals, on the other hand, sought to compensate Chris-Craft for the decline in the value of its Piper holdings suffered when Bangor Punta unfairly gained control of Piper (B. 17-32). Indeed, as the court of appeals correctly found, when Bangor Punta gained control of Piper, the value of Chris-Craft's Piper shares was significantly reduced (B. 18-20, B. 28-32). In such a situation, the award of "actual damages" to Chris-Craft, assuming that

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[370] Whether or not the general limitations in Sections 11 and 12 of the Securities Act are applied, by analogy, to this action, it seems appropriate that, as in Section 11(e) of the Securities Act, if the defendants can demonstrate that all or part of the plaintiff's damages were the result of factors other than the defendant's wrongdoing, the award of damages should be diminished accordingly.

the necessary element—the causation of those damages by the defendants' unlawful conduct—is shown, should include any reduction in value in order to be compensatory. As the court of appeals explained:

> "Moreover, the [district] court erroneously assumed that our phrase "appraisal value" referred to a statutory appraisal proceeding. Such connotation, had we intended it, would have justified the conclusion that there had been no reduction in the value of CCI's Piper holdings upon BPC's gaining control. Our opinion in *Chris-Craft II*, however, expressly forecloses any such intention. We pointed out at least three times that CCI had sustained injury as the result of BPC's unfairly gaining control and that the injury sustained was a decline in the value of CCI's Piper holdings. First, in assessing the impact of defendants' Section 14(e) violations upon CCI, we stated:
>
> > 'The specific injury sustained was a reduction in the value of CCI's Piper holdings upon BPC's unfairly obtaining control. . . .' 480 F.2d at 375.
>
> "Second, in evaluating the damaging effect of BPC's violations of Rule 10b-6, we held:
>
> > 'BPC's attainment of a majority position has caused CCI to suffer a decline in the value of its Piper holdings.' 480 F.2d at 379.
>
> "Third, in our mandate with respect to the proper measure of damages, we said:
>
> > 'The measure of damages should be the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority position and reducing CCI to a minority position. . . .' 480 F.2d at 380.
>
> "Accordingly, the [district] court's assumption that there had been no such reduction in the value of CCI's Piper holdings was the first step in reaching an erroneous formulation of damages" (B. 18-19).

The district court's theory of damages did not compensate Chris-Craft for its "actual damage." The principle applied by the court of appeals in attempting to compensate Chris-Craft for decline in value of its Piper holdings, to the extent shown and to the extent caused by the wrongful acts of the defendants, in the Commission's view, is correct.[371]

IV. SECURITIES EXCHANGE ACT RULE 10b-6 WAS ADOPTED TO PRECLUDE ACTUAL OR POTENTIAL MANIPULATIVE CONDUCT IN CONNECTION WITH THE PUBLIC DISTRIBUTION OF SECURITIES, INCLUDING EXCHANGE TENDER OFFERS, AND THERE IS A PRIVATE ACTION ON BEHALF OF ANY PERSON ADVERSELY AFFECTED BY VIOLATION OF THE RULE.

"Federal regulation of transactions in securities emerged as part of the aftermath of the market crash in 1929." [372] That regulation was adopted in response to the Senate's intensive study of Stock Exchange

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[371] The precise method of computing damages in accordance with the general principle that the court of appeals purported to apply is a matter as to which the Commission expresses no position.

[372] *Ernst & Ernst* v. *Hochfelder, supra,* 96 S. Ct. at 1381.

Practices,[373] a principal focus of which was the manipulative devices that had led to the crash.[374] Indeed, the Report itself noted that "[t]he exposure of the extent and effect of manipulative practices upon organized exchanges was one of the most salutory and important accomplishments of the investigation." [375] And, the results of that investigation "laid the foundation for remedial legislation in a field heretofore unregulated." [376]

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[373] Senate Committee on Banking and Currency, *Report on Stock Exchange Practices*, S. Rep. No. 1455, 73d Cong., 2d Sess. (1934).

The Senate's study commenced on April 11, 1932, and finished more than two years later, on May 4, 1934, after compiling 12,000 printed pages of testimony and 1,000 pages of exhibits. *Id.*, at pp. 2-3.

[374] *Id.*, at pp. 30-54.

[375] *Id.*, at p. 30.

[376] S. Rep. No. 792, 73 Cong., 2d Sess. 3 (1934).

Prior to the adoption of the Securities Exchange Act of 1934, "[t]he legal approach to the problem of market manipulation was primarily through the concept of fraud." Comment, *Regulation of Stock Market Manipulation*, 56 Yale L.J. 509, 516 (1947); *accord*, Berle, *Liability for Stock Market Manipulation*, 31 Col. L. Rev. 264 (1931). As one commentator noted, "the reach of [the] strict fraud doctrine was * * * far too short * * *. In the United States prior to 1934 no case established the illegality of any form of manipulation by actual purchases and sales * * *." Comment, *Regulation of Stock Market Manipulation, supra*, 56 Yale L.J. at 516-517. But see, *United States* v. *Brown*, 5 F. Supp. 81 (S.D. N.Y., 1933), *affirmed*, 79 F.2d 321 (C.A. 2), *certiorari denied, sub nom. McCarthy* v. *United States*, 296 U.S. 650 (1935); Berle, *Liability for Stock Market Manipulation, supra*, 31 Col. L.Rev. 264; Berle, *Stock Market Manipulation*, 38 Col. L.Rev. 393 (1938).

In considering legislative approaches to manipulative conduct, Congress was concerned with the importance of securities exchanges to the overall economic well-being of the Nation, and its concern was reflected in Section 2 of the Act.[377] Thus, Congressional concern with manipulative devices was not limited to the damaging effects manipulative conduct could have on individual investors, although those effects were of sufficient concern to warrant the provision of express remedies for investors actually damaged by manipulative conduct.[378] Rather, Congress was concerned with the honesty and fairness of the marketplace for securities,[379] and feared that disorderly and unfair markets either could induce excessive speculation,[380] which, in turn, could wreak economic havoc, or could paralyze would-be investors and precipitate the allocation of their savings to investment devices other than securities.

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[377] See Section 2(3) of the Securities Exchange Act, 15 U.S.C. 78b(3).

[378] Section 9(e) of the Securities Exchange Act, 15 U.S.C. 78i(e).

[379] See, *e.g.*, H.R. Rep. No. 85, 73 Cong., 1st Sess. 1-5 (1933).

[380] See H.R. Rep. No. 1383, 73d Cong., 2d Sess. 11 (1934):

> "the accentuation of temporary fluctuations and the deliberate introduction of a mob psychology into the speculative markets by the fanfare of organized manipulation menace the true functioning of the exchanges upon which the economic well-being of the wholy country depends."

> "Behind the anti-manipulative provisions as a whole was the conviction that manipulation bred excessive speculation and unstable security prices which, irrespective of fraud, injured the public by unsettling the credit cycle and interfering with the proper performance of the market function in valuing securities." [381]

This broader purpose led the Congress to adopt far-reaching proscriptions and regulatory controls for manipulative devices of all types. And, the specific provisions adopted to prohibit manipulative devices are "[t]he very heart of the Act." [382]

In structuring its legislative response to manipulative conduct, Congress was well aware that there were widely-varying devices used to stimulate or discourage the buying and selling of securities and that the easy negotiability of securities made the securities markets highly susceptible to that type of conduct.[383]

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[381] Comment, *Regulation of Stock Market Manipulation, supra,* 56 Yale L.J. at p. 521 (footnote omitted).

[382] Securities and Exchange Commission, *Report on Proposals for Amendments of the Securities Act of 1933 and the Securities Exchange Act of 1934,* H.R. Comm. Print, 77th Cong., 1st Sess. 50 (1941).

[383] See, *e.g.,* Mathias, *Manipulative Practices and the Securities Exchange Act,* 3 U. of Pitt. L.Rev. 7, 104 (1934); Moore & Wiseman, *Market Manipulation and the Exchange Act,* 2 U. of Chi. L.Rev. 46 (1934); Comment, *Market Manipulation and the Securities Exchange Act,* 46 Yale L.J. 624 (1937); Comment, *Regulation of Stock Market Manipulation,* 56 Yale L.J. *supra,* at p. 509, 512.

While it was apparent that a leading manipulative device was fraudulent publicity, whether directed to the market generally or directed to a specific security,[384] the record compiled by the Senate in its investigation of Stock Market Practices revealed that a more effective means of manipulation was the use of the market itself to reflect actual or apparent trading activity. Congress found that the notorious "pool" operators of the 1920's and 1930's [385] were not above arranging securities transactions for the purpose of creating the appearance of independent market activity, the effect of which was to alter the independent price-valuation mechanism of the exchange markets.[386] Persons engaged in such manipulation

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[384] See, *e.g.,* Twentieth Century Fund, Inc., *The Securities Markets* 478 (1935).

[385] "A pool * * * is an agreement between several people, usually more than three, to actively trade in a single security. * * * [T]he purpose of a pool generally is to raise the price of a security by concerted activity on the part of the pool members, and thereby to enable them to unload their holdings at a profit upon members of the public attracted by the activity or by information disseminated about the stock. Pool operations for such a purpose are incompatible with the maintenance of a free and uncontrolled market" (footnote omitted).

S. Rep. 1455, 73d Cong., 2d Sess. 31 (1934).

[386] As the Senate Report noted,

> "The true function of the exchanges is to maintain an open market for securities, where supply and demand may freely meet at prices uninfluenced by manipulation and control."

S. Rep. No. 1455, 73d Cong., 2d Sess. 30 (1934); see also, Berle, *Liability for Stock Market Manipulation, supra,* 31 Col. L.Rev. at pp. 266-267.

would arrange to have both buy and sell orders entered for the same security at the same price, producing a recorded transaction in the market indistinguishable from the external appearance of a normal transaction executed by independent and random buyers and sellers. In recognizing that those pool-fomented activities—"wash" sales and "matched orders" [387]—created "a false and deceptive appearance of genuine demand for the security * * *," Congress rejected the "[a]ttempts * * * to differentiate between 'beneficent' pools and 'nefarious' pools." Instead, it concluded that,

> "From the viewpoint of the purchaser outside the pool circle, there is no substantial or ethical difference in these two types of pools. Although the purpose may be different, the means employed are identical. In all cases fictitious activity is intentionally created, and the purchaser is deceived by an appearance of genuine demand for the security. *Motive furnishes no justification for the employment of manipulative devices.*" [388]

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[387] In *Ernst & Ernst* v. *Hochfelder*, *supra*, 96 S. Ct. at 1386 n. 25 (1976), this Court appropriately defined wash sales and matched orders as follows:

> " 'Wash' sales are transactions involving no change in beneficial ownership. 'Matched' orders are orders for the purchase sale of a security that are entered with the knowledge that orders of substantially the same size, at substantially the same time and price, have been or will be entered by the same or different persons for the sale/purchase of such security".

[388] S. Rep. No. 1455, *supra*, at p. 32 (emphasis supplied). The evil sought to be proscribed was the creation of an appearance of false demand, irrespective of the ends the pool operators were seeking to achieve. See p. 171, *infra*.

But, unlike wash sales, and matched orders, for which no justification could be found, Congress repeatedly was made aware that stabilizing activities in the face of a distribution of securities,[389] could have legitimate purposes, and that the United States government itself had engaged in stabilizing conduct in its own sales of certain securities and commodities.[390]

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[389] Stabilization has been described as follows:

> "When [a] * * * distribution begins, whether the distribution price has been raised by manipulation or not, it will be in the interest of the distributors to maintain that price on the market throughout the course of the distribution. The market price may be subject to depression from a number of causes. Speculators or investors who have changed their minds may dump on the market the stocks which they bought on the direct distribution. Market conditions as a whole may become unfavorable. Buyers who would normally absorb sales in the open market may transfer their interest to the shares being distributed * * *. To counteract these effects the distributors support the market price by entering bids and by purchasing * * * to absorb selling pressures encountered.
>
> The converse of purchasing to raise the market price is selling to depress it. A well-timed number of sell orders, if sufficient in volume to overcome buying pressure, may succeed in driving the market price of a security down to a point at which it can be bought back at a profit."

Comment, *Regulation of Stock Market Manipulation*, 56 Yale L.J. 509, 514 (1947) (footnote omitted). See also, Securities and Exchange Commission, *Statement on Regulation of "Pegging, Fixing and Stabilizing" of Securities Prices*, Securities Exchange Act Rel. No. 2446 (Mar. 18, 1940).

[390] "When the original draft of the bill was before the House and Senate committees at public hearings * * * [i]t was

In drafting the Securities Exchange Act, therefore, Congress attempted to deal separately and specifically with the varying forms of manipulation to which it had been exposed. Since Congress recognized that any beneficently-motivated large purchases or sales of a security could also raise or depress the market price of the traded security,[391] it took care to insure that its efforts to proscribe manipulative conduct not be drafted in such a fashion as to prohibit legitimate trading activities not properly the subject of restrictive legislation. Accordingly, where classes of trading, appropriately described as manipulative, appeared "to serve no legitimate function," [392] they were "specifically prohibited." [393] In other areas, the Congress recognized that "so delicate a mechanism as the modern stock exchange cannot be regulated efficiently under a rigid statutory program." [394] As a result,

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pointed out that the Government in recent times, particularly, has resorted to stabilizing or pegging processes to stabilize the market in the issuance and distribution of Government securities, and the point was made that that proved that there is some benefit to the public in certain kinds of pegging processes or stabilizing processes. It was in deference to that argument, based upon the example of governmental activities, that this clause [Section 9(a)(6)] was written."

Senate Committee on Banking and Currency, *Hearings on Stock Exchange Practices*, 73d Cong., 1st Sess., 7736 (1934) (remarks of Mr. Pecora).

[391] S. Rep. 792, 73d Cong., 2d Sess. 7 (1934).

[392] *Id.*

[393] *Id.*

[394] *Id.*, at p. 5.

broad rulemaking authority was vested in the Securities and Exchange Commission—authority referred to by the Congress as a "discretionary and elastic" power—in order

> "to avoid, on the one hand, unworkable 'straitjacket' regulation and, on the other, loopholes which may be penetrated by slight variations in the method of doing business." [395]

Section 9 of the Act is the embodiment of the major Congressional effort to assure the maintenance of free and open securities markets, in which prices would be determined by natural forces of supply and demand, not by manipulative devices inflating or depressing prices artificially.

Some of the specific provisions dealing with manipulation in Section 9 trace their origin to the law of fraud. Thus, Section 9(a)(1) prohibits wash sales and matched orders if effected "for the purpose of creating a false or misleading appearance of active trading in any security * * * or a false or misleading appearance with respect to the market for any such security." [396] Similarly, Section 9(a)(4) of the Act forbids "false or misleading statements" with regard to material facts in inducing the purchase or sale of

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[395] *Id.*

[396] See Comment, *Regulation of Stock Market Manipulation*, *supra*, 56 Yale L.J. at 519:

> "This phraseology [in Section 9(a)(1)] treats the wash sale and matched order as a form of misrepresentation; it is an expanded concept of fraud, however, since there need be no showing of damage to anyone."

a registered security, also embodying a fraud concept.[397]

And, Sections 9(a)(3) and 9(a)(5) proscribe the use of tips of impending manipulative price changes to induce purchases or sales of securities. "The policy of insulating the public from incentives to excessive speculation is the primary aim here rather than the protection of purchasers and sellers from fraud."[398]

These specific provisions in Section 9 are complemented by the more general, but broader ranging, proscriptions contained in Section 9(a)(2) of the Act, the purpose of which is to make unlawful not only pool operations, but "every other device used to persuade the public that activity in a security is the reflection of genuine demand instead of a mirage." S. Rep. No. 1455, 73d Cong., 2d Sess., 54 (1934).[399] In an attempt to deal with the concern of many wit-

[397] "It is not an element of the offense under this section [9(a)(4)] that the misleading statement be made directly to a prospective seller or purchaser." 3 Loss, *Securities Regulation* 1543 (2d ed., 1961).

[398] Comment, *Regulation of Stock Market Manipulation, supra*, 56 Yale L.J. at p. 520 (footnote omitted).

[399] In contrast to Section 9(a)(1) of the Act—which proscribes wash sales and matched orders only if intended to mislead—Section 9(a)(2) proscribes manipulation by actual purchases and sales if intended to induce others to buy or sell the security. Section 9(a)(2), the Commission held early in its administration of the Act, thus permits the condemnation of activities which fall far short of "actual fraud." *In the Matter of White & Weld*, 3 S.E.C. 466, 513 (1938); see also, Herlands, *Criminal Law Aspects of the Securities Exchange Act of 1934*, 21 Va. L. Rev. 139 (1934).

nesses that "pegging, fixing, or stabilizing" the price of registered securities might not always prove objectionable, however, Congress also adopted Section 9(a)(6) of the Act, as an exception, of sorts, to the blanket prohibitions contained in Section 9(a)(2). Section 9(a)(6) prohibits stabilizing transactions only if they are effected in contravention of Commission regulations. "[I]t leaves it entirely within the discretion of the * * * Commission to say what kind of pegging or stabilizing operations may be permitted as deemed to be in the public interest."[400]

But, Congress also realized that the detailed scheme of Section 9 of the Act would not, by its very terms, reach those securities traded only in the over-the-counter securities markets and that it was impossible to catalogue every device which might prove manipulative.[401] Accordingly, it enacted Section 10(b) of the Act, making it unlawful to employ, in connection with the purchase or sale of *any* security, "any ma-

[400] Senate Committee on Banking and Currency, *Hearings on Stock Exchange Practices*, 73d Cong., 1st Sess., 7736-7737 (remarks of Mr. Pecora).

[401] See, *e.g.*, 3 Loss, *Securities Regulation, supra*, at 1546:

> "It is not altogether correct to speak of § 9 as coextensive with manipulation of the *exchange* markets. On the one hand, it applies to over-the-counter manipulation of registered securities * * *. On the other hand, § 9 does not apply to exempted securities even when they are traded on an exchange; there the attack on manipulation is made on the same basis as it is with respect to securities which are traded solely in the over-the-counter market" (footnotes omitted, emphasis in original).

nipulative or deceptive device or contrivance" in contravention of rules and regulations proscribed by the Commission "as necessary or appropriate in the public interest or for the protection of investors." Similarly, Section 15(c)(1) of the Act was adopted to prohibit brokers and dealers in securities from effecting any transaction in, or inducing the purchase or sale of, a security over-the-counter, by means of "any manipulative, deceptive or other fraudulent device or contrivance" as defined by the Commission. "[T]he antifraud provisions of the 1933 and 1934 acts have been held in the case of securities traded solely in the over-the-counter market to impose substantially the same prohibitions as § 9(a)." [402]

In sum, the Act attacks manipulative conduct through outright proscriptions, both specific and general, through generalized rulemaking powers to prohibit other forms of manipulation not specifically catalogued, and through clearly defined regulatory powers; it seeks to assure that those trading activities not improper *per se*, but carrying the potential for adverse manipulative consequences, would be employed only under carefully circumscribed conditions subject to monitoring by the Commission. But, unlike the Act's antifraud provisions, which have as their primary purpose the counteraction of deception of a personalized nature,

> "The antimanipulative provisions of the Securities Exchange Act are directed not only against

[402] 3 Loss, *Securities Regulation, supra,* at 1573.

> the defrauding of unwary investors but [are directed] with equal force against the impediments to a free and open market created by artificial stimulants or restraints." [403]

In implementing its broad mandate, the Commission's initial approach to the regulation of stabilizing activities has been described as a cautious one.[404] In its first five years, it did not adopt any rules respecting stabilization, and then, in 1939, its first attempt at rulemaking consisted solely of "a relatively simple disclosure rule." [405]

In 1940, however, the Commission adopted its first substantive regulation of stabilizing—Regulation X-9A6-1.[406] The regulation was designed to deal with primary or secondary distributions of securities offered "at the market"—that is, securities distributed at the prevailing market price, or very close to it. Because such an offering inherently carries with it the representation that the market price at which the security is being sold is a fair and unmanipulated price, the Commission's rule established restrictions on the extent of stabilizing activities and prescribed disclosure requirements as well. Shortly thereafter, the Commission issued a policy statement, discussing its difficulties with stabilizing, recognizing

[403] *In the Matter of Masland, Fernon & Anderson,* 9 S.E.C. 338, 344 (1941).

[404] 3 Loss, *Securities Regulation, supra,* at 1574.

[405] *Id.*

[406] Securities Exchange Act Rel. 2363 (Jan. 3, 1940).

all stabilizing activities as manipulative, and indicating its concern that, in the absence of stabilizing, or a meaningful substitute for it, American underwriters would be unable to assist industry in raising necessary capital.[407] And, the Commission indicated its intention to monitor stabilizing activities, and proposed substitute, or additional, stabilizing regulations predicated upon its experience with Regulation X-9A6-1.[408]

Securities Exchange Act Rules 10b-6, 10b-7 and 10b-8 eventually superseded Regulation X-9A6-1, and were prompted by a Commission investigation of manipulative activities uncovered in connection with an unsuccessful common stock offering of Kaiser-Frazer Corporation in February, 1948. In connection with its investigation, the Commission sought public comment on the need to adopt rules or recommend additional legislation regarding stabilizing purchases and on the adequacy of its existing regulations in the area of manipulative conduct.[409]

While little of substance resulted from the Commission's request for public comments,[410] in 1952, the Kaiser-Frazer offering and attendant market problems became the subject of hearings by a subcommittee of the House Committee on Interstate and Foreign Commerce. The subcommittee found that the

[407] Securities Exchange Act Rel. 2446 (Mar. 18, 1940).

[408] *Id.*

[409] Securities Exchange Act Rel. 4163 (Sept. 16, 1948).

[410] 3 Loss, *Securities Regulation, supra,* at 1581.

Kaiser-Frazer debacle "cast some doubt on the effectiveness of the statute, or on the administration thereof by the Commission * * *." [411] The subcommittee concluded:

> "In 1940 [the Commission] stated its intention to proceed somewhat by trial and error [in applying the Act's anti-manipulative provisions to pegging, fixing and stabilizing practices] until it could develop the facts and arrive at some recommendation which it might present to the Congress. It is apparent that during the ensuing years [the Commission] has proceeded chiefly by interpretation in individual cases, and has not promulgated any rules or regulations covering the major practices, as the statute requires it to do. * * *
>
> "We are of the belief that the Commission earnestly and expeditiously should grapple with this problem, with the view either of the early promulgation of rules publicly covering these operations, or of recommending to the Congress such changes in legislation as its experience and study now show to be desirable." [412]

In response to this directive, Rules 10b-6, 10b-7 and 10b-8 were proposed by the Commission in 1954 [413] and, after extensive comments, a public hearing and

[411] H.R. Rep. No. 2508, 82d Cong., 2d Sess. (1952).

[412] *Id.*, at 116.

[413] Securities Exchange Act Rel. No. 5040 (May 18, 1954).

publication of a revised proposal,[414] these rules were adopted in 1955.[415] Evidencing the origin and subject matter of these rules, the Commission adopted them pursuant to *both* Sections 9(a)(6) and 10(b) of the Act.

The rules deal generally with practices intended, among other things, to peg, fix or stabilize the price of securities during their distribution to the public. They are designed to ensure the preservation of fair and honest markets for securities both registered on an exchange and those traded exclusively over-the-counter. Together, the rules are intended to prevent certain types of trading abuses which the Commission, after twenty-one years of experience in detecting and attempting to prevent manipulative and deceptive trading during securities distributions, determined were used widely to establish artificial and misleading price levels in the market place to facilitate the efforts of those attempting to sell substantial amounts of securities to the public.[416]

Consistent with the statutory presumption that not all stabilizing activities were necessarily detri-

[414] Securities Exchange Act Rel. No. 5159 (Apr. 19, 1955).

[415] Securities Exchange Act Rel. No. 5194 (Jul. 5, 1955).

[416] These activities had been the subject of Commission enforcement efforts from the very inception of its administration of the Act. See, *e.g.*, *Halsey Stuart & Co.*, 30 S.E.C. 106, 111-112 (1949); *Federal Corporation*, 25 S.E.C. 227 (1947); *Thompson Ross Securities Co.*, 6 S.E.C. 1111, 1122 (1940); *Canusa Gold Mines, Ltd.*, 2 S.E.C. 548, 554-555 (1937).

mental to the public and the maintenance of fair and honest markets, however, the rules do not absolutely proscribe all stabilizing conduct that falls within their terms. Rather, classes of market activities, acceptable as a general proposition, are set forth in the rules, and, in addition, each of the rules provides for additional, *ad hoc*, exemptions upon application to the Commission, and a determination by it that the transaction, or series of transactions, for which an exemption is sought will not be conducted in such a way as to have a manipulative or deceptive effect on the markets.[417]

Rule 10b-6, which was found to have been violated in this case, is aimed at protecting the existing market place for securities which become the subject of a "distribution."[418] "Manipulation was often accomplished by those about to sell securities or already engaged in selling securities bidding on the market for the same securities, thereby creating an unjustifiable impression of market activity which would

[417] See 17 C.F.R. 240.10b-6(f); 17 C.F.R. 240.10b-7(*o*); 17 C.F.R. 240.10b-8(f).

[418] "The term 'distribution' as used in Rule 10b-6 is to be interpreted * * * as covering offerings of such a nature or magnitude as to require restrictions upon open market purchases by participants in order to prevent manipulative practices. For these purposes a distribution is to be distinguished from ordinary trading transactions and other normal conduct of a securities business upon the basis of the magnitude of the offering and particularly upon the basis of the selling efforts and selling methods utilized."

Bruns, Nordeman & Co., 40 S.E.C. 652, 660 (1961).

facilitate the sale at artifically high prices. This was one of the practices which the Securities Exchange Act was designed to eradicate, and it is the practice which is covered by Rule [10b-6]." [419]

Accordingly, Rule 10b-6 makes it unlawful for persons connected with the distribution of securities—such as the issuer of the securities, the underwriter, or participating broker-dealers and others similarly situated—to bid for or purchase any security which is the subject of the distribution, or any security which may constitute a right to purchase the class of securities being distributed, until after those persons have completed their part in the distribution. The Rule delineates eleven categories of transactions not considered to raise the potential for manipulation of the marketplace, and these transactions are explicitly exempt from the Rule's coverage. "The rationale [of the rule] is that a potential purchaser of the securities being distributed should not be induced into buying them because of abnormal market pressures driving the price up through secret purchases by the issuer or [its] underwriters." [420]

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[419] *Securities and Exchange Commission* v. *Scott Taylor & Co.*, 183 F. Supp. 904, 907 (S.D. N.Y., 1959). *Accord, e.g., Weitzen* v. *Kearns*, 271 F. Supp. 616, 623 (S.D. N.Y., 1967); *In the Matter of Collins Securities Corp.*, 8 *S.E.C. Docket* 250, Securities Exchange Act Rel. No. 11766 (Oct. 23, 1975), *appeal pending*, No. 75-2200 (C.A. D.C.); Weiss & Leibowitz, *Rule 10b-6 Revisited*, 39 Geo. Wash. L. Rev. 474, 476-477 (1971).

[420] Binder, *The Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569, 666 (1973).

Of key importance in this case is the fact that Rule 10b-6 precludes open market purchases both of the securities directly being (or about to be) distributed, and of other securities or instruments which are convertible into the securities directly being distributed. In this case, Bangor Punta is alleged to have made "secret purchases" of Piper securities at the same time that it was publicly offering to "distribute" Bangor Punta securities, and Piper securities were convertible into Bangor Punta securities. As the court below correctly, and succinctly, held:

> "Rule 10b-6 prohibits bids for or purchases of a security by or on behalf of the issuer of a security if the security is 'the subject of * * * [a] distribution.' Included within the prohibition are bids for or purchases of 'any right to purchase any such security.' Clearly here, Piper stock, within the meaning of Rule 10b-6, was a 'right to purchase' [Bangor Punta] stock." [421]

The incentive for persons interested in a distribution of securities to manipulate the market for "rights to purchase"—or securities convertible into—the securities being distributed varies according to the type of distribution. In a public offering of securities that is underwritten, for example, the issuer and its underwriters may be tempted to "rig" the market in order to preclude or inhibit sales prior to, or during, the period in which securities are to be distributed, in order to avoid any depressing effect that open

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[421] A. 63.

market sales of the same securities might have on the price at which the new securities are to be offered.

Instruments convertible into the securities being distributed also can, potentially, depress the offering price of the securities to be distributed, when the market price of the instruments, in relation to the price of the securities to be distributed, would encourage the conversion and subsequent sale of the securities obtained upon conversion. In such a situation, the breadth of Rule 10b-6 is necessary to preclude persons interested in a distribution from attempting to effect purchases of the convertible instruments in such a way as to raise their price. An increase in the market price of the convertible instruments could make the exercise of conversion rights economically unattractive and preclude open market sales of the securities that are the subject of the distribution.[422]

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[422] For example, assume that an issuer has a publicly-traded class of common stock outstanding, with a market price of $20 per share, and also has outstanding a class of warrants to purchase that common stock at an exercise price of $15 per share. Assume also that the warrants sell at a current market price of $5 per share.

If the conversion feature of the warrants is exercised, and the common stock obtained as a result is sold, those sales of the common stock can depress the market price of the common stock. If the issuer is planning a public offering of the same common stock at a price of $20 per share, the unfettered conversion of the warrants into the issuer's common stock, and the subsequent sale of the common stock obtained as a result, if effected immediately prior to, or during, the new distribution of common stock, could compel the issuer to lower its offering price to reflect the market price prevailing at the time of the offering.

In order to facilitate its distribution of common stock, and to maximize the proceeds obtained from that distribution, the issuer may be tempted to make aggressive purchases of its own warrants, driving their price to, say, $6 per warrant. In that event, the exercise of the warrant, and subsequent sale of the securities so obtained, would be uneconomical—it would yield only $20 at a cost of $21: $15 representing the cost of exercising the warrant, and $6 representing the purchase price of the warrant.

In an exchange tender offer, there are additional manipulative temptations and opportunities that can be seized in connection with transactions in securities which are convertible into the securities being distributed. As the court below concluded, there are "decided benefits" which can result from an exchange offeror's purchases of a target company's securities:

> "If the price of the target company's stock does increase in response to cash purchases by the exchange offer or [sic] after the offer has been announced, many shareholders in the target company are likely to assume that the price increase results solely from the bullish effect of the exchange offer on the market. Small investors especially would be likely to assume that the exchange offer was receiving serious attention and approbation from larger, more knowledgeable investors than they. The managements of either the target company or the offeror can compound this impression by announcing the number of shares of target stock acquired by the offeror since the initiation of the exchange offer. Absent some indication to the contrary, the target

company shareholders would be likely to assume that the entire increase resulted from the offer, not from cash purchases in addition to the offer." [423]

Nor are the events in this case unusual. Prior to the adoption of Securities Exchange Act Rule 10b-13, expressly governing cash purchases of target company securities by tender offerors,[424] it was not uncommon, although not proper, in competing offers for corporate control for one offeror to purchase the target company's securities directly in the open market, in a manner designed to raise the price of the target

[423] C. 17.

[424] Securities Exchange Act Rel. No. 8712 (Nov. 10, 1969). Rule 10b-13 provides in pertinent part, that:

> "No person who makes a cash tender offer or exchange offer for any equity security shall, directly or indirectly, purchase, or make any arrangement to purchase, any such security (or any other security which is immediately convertible into or exchangeable for such security), otherwise than pursuant to such tender offer or exchange offer, from the time such tender offer or exchange offer is publicly announced or otherwise made known by such person to holders of the security to be acquired until the expiration of the period, including any extensions thereof, during which securities tendered pursuant to such tender offer or exchange offer may by the terms of such offer be accepted or rejected."

The rule also provides that the Commission may exempt "any transaction upon written request or upon its own motion," 17 C.F.R. § 240.10b-13(d). Had Rule 10b-13 been in effect at the time of Bangor Punta's purchases here, those purchases would have violated the rule, unless they had been exempted by the Commission. 17 C.F.R. 10b-13(a).

company's securities above the level of the competing offer, in order to defeat that offer.[425]

The various briefs of each of the parties to this action seek to apply or distinguish this Court's recent decisions in *Blue Chip Stamps* v. *Manor Drug Stores* [426] and *Ernst & Ernst* v. *Hochfelder*,[427] both of which analyze implied private remedies under Rule 10b-5, in determining whether there is implied standing in Chris-Craft to sue for a violation of Rule 10b-6, and whether there should be any limitations upon the scope of such a remedy if implied, or the relief to be granted under it. Those decisions may well be inapplicable to this case (see pages 137-140, 149-159, *supra*), but if applicable should not militate against the maintenance of an action under Rule 10b-6 as the lower court held.

As noted above, the class of persons intended to be protected from the effects of the manipulative conduct encompassed within Rule 10b-6 includes all users of the markets for the relevant securities—that is, the securities being distributed, or rights to purchase the securities being distributed. Viewed in this light, this Court's recent decsion in *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*, presents no impediment to the maintenance of an action under Rule

[425] See 5 Securities and Exchange Commission, *Report of Institutional Investor Study*, H.R. Doc. No. 92-64, 92d Cong., 1st Sess. 2804-2806, 2832 (1971).

[426] 421 U.S. 723 (1975).

[427] 96 S. Ct. 1375 (1976).

10b-6 by a defeated offeror against a competitor for violations of the Rule.

As this Court stated in *Blue Chip Stamps*, only those potential plaintiffs who neither bought nor sold relevant securities "either in a new offering or on the Nation's post-distribution trading markets," are barred from recovery in actions based upon Section 10(b) of the Act. 421 U.S. at 737. But, where a defeated offeror has purchased relevant securities—the target company's stock—it is precisely the kind of purchaser intended to be afforded a private remedy in actions grounded upon Section 10(b). There is no danger in such a case, contrary to the danger this Court perceived existed in *Blue Chip Stamps*, that recognizing standing will permit a class of plaintiffs to sue for

> "intangible economic injury such as loss of a noncontractual opportunity to buy or sell * * * seeking a largely conjectural and speculative recovery in which the number of shares involved will depend on the plaintiff's subjective hypothesis."

421 U.S. at 734-735. Nor is there any requirement of direct privity between the plaintiff and the alleged market manipulator in a Rule 10b-6 action, for, as this Court stated in *Blue Chip Stamps:*

> "In today's universe of transactions governed by the Securities Exchange Act of 1934, privity of dealing or even personal contact between potential defendant and potential plaintiff is the exception and not the rule. * * * Obviously neither

> the fact that issuers or other potential defendants under Rule 10b-5 reach a large number of potential investors, or the fact that they are required by law to make their disclosures conform to certain standards, should in any way absolve them from liability for misconduct which is proscribed by Rule 10b-5."

421 U.S. at 723

Moreover, a violation of Rule 10b-6, once established, should not also require an additional showing that the violative acts had a specific manipulative effect on the market.[428] That, more properly, is an argument to be addressed to the Commission in advance of the transaction.[429] The prohibition against

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[428] The manipulative potential of an exchange offeror's purchases of the target company's stock during the exchange offer (and the potential damage distortion of the market for the target's stock would inflict) has already been discussed (see pp. 181-184, *supra*). Nor could the subsequent disclosure of unlawful purchases cleanse those purchases of their manipulative effects; indeed, if anything, such disclosure would accentuate that effect by presenting to the public a heightened current market price for the securities offered in exchange. This is precisely the kind of manipulative possibility Rule 10b-6 was designed to preclude. *Cf., Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F. 2d 787 (C.A. 2, 1969).

[429] As noted above (p. 179, *supra*) subsection (f) of Rule 10b-6 was adopted precisely to permit the Commission and its staff to consider such assertions, and to require such conditions to the transaction as would ensure the absence of an adverse manipulative effect. No such application was made here, preventing the Commission's staff from assuring that appropriate precautions against manipulative market effects were undertaken by the purchaser.

purchasing "rights to purchase" securities of the class being distributed, as well as against purchasing securities of that class, has been set forth clearly in Rule 10b-6 since its inception.[430] It is one thing, in a case involving an assertion of liability under Rule 10b-5, based upon negligence, as in *Ernst & Ernst* v. *Hochfelder*, *supra*, to conduct an inquiry into the defendant's intent under the specific circumstances there presented, especially in light of Rule 10b-5's general prohibitions against employing any "artifice to defraud" or engaging in acts which "would operate as a fraud or deceit upon any person" (prohibitions as general and all-encompassing as Section

[430] The application of the prohibition against acquiring "rights to purchase" during a distribution to the securities of a target company in an exchange offer was generally understood prior to the inception of this case. For example, a seminal law review article on the subject by William Ward Foshay (a member of the New York Law firm of Sullivan & Cromwell, and counsel to First Boston in this action), entitled *Market Activities of Participants in Securities Distributions*, 45 Va. L.Rev. 907, 920-921, 931-932 (1959) (reprinted in Section of Corporation, Banking and Business Law of the American Bar Association, *Selected Articles on Federal Securities Law* 747 (1968)), quite cogently discussed the applicability of Rule 10b-6's prohibitions to purchases of target company stock and the need to obtain an exemption from those prohibitions (pursuant to Rule 10b-6(f)) as a prerequisite to such purchases.

Moreover, prior to the events in issue in this action, the Commission published Securities Exchange Act Rel. No. 8595 (May 5, 1969), proposing the adoption of Securities Exchange Act Rule 10b-13, which explicitly sets forth this requirement. In its release, the Commission noted that the proposed rule represented "a codification of existing interpretations under Rule 10b-6."

10(b) itself). It is quite another thing, however, to require the same kind of inquiry and proof where the particular act complained of is specifically proscribed by a Commission rule designed to prevent the occurrence of that very act in the very context in which it occurred, all in the interests of preventing manipulation of the marketplace.[431]

Thus, where the Commission has performed with specificity the task set before it by the Congress in the Act—to define acts which are fraught with the potential for fraud, deceit and manipulation and to adopt means reasonably designed to prevent them—it should be necessary to prove only that Rule 10b-6 was knowingly violated,[432] that the complaining party

[431] "[Rule 10b-6] proscribes and clearly defines a *practice* which has, prior to 1955, been used fraudulently to distort the 'over-the-counter' market." *Jaffee & Company* v. *Securities and Exchange Commission*, 446 F. 2d 387, 391 (C.A. 2, 1971) (emphasis in original).

[432] It is not contested that Bangor Punta's purchases of Piper stock were made knowingly and for the purposes of defeating Chris-Craft's competing offer. The so-called scienter question, therefore, can be resolved by the undisputed facts that Bangor Punta intended to do what it did, and that the kind of act in which it engaged has been defined by the Commission within its express authority as constituting a "manipulative or deceptive device or contrivance." *Cf. Herzfeld* v. *Laventhal, Krekstein, Horwath & Horwath*, CCH Fed. Sec. L. Rep. ¶ 95,660 (C.A. 2, 1976); *Bailey* v. *Meister Brau, Inc.*, CCH Fed. Sec. L. Rep. ¶ 95,543 (C.A. 7, 1976). This case does not involve "negligent conduct alone," as did *Ernst & Ernst* v. *Hochfelder, supra*. Intentional acts which violate Rule 10b-6 are enough, for, "where the rule applies, its prohibitions

purchased or sold securities of the manipulated class, and that the complaining party was actually and demonstrably injured as a result of the violative conduct.

Any other result would render nugatory the "discretionary and elastic" powers granted to the Commission to root out and proscribe particular manipulative and deceptive practices.[433] If a general inquiry as to each rule violator's intentions in violating the Commission's specific antimanipulative rules, and the effects of such violations, is required in each case, there would be no need for specific rules. Rule 10b-5 itself would be enough, and would accomplish all that the Commission could do under such circumstances to prevent manipulation of the Nation's trading markets: for, the same standards of proof would be required for all manipulative and deceptive acts and practices, irrespective of whether certain types of acts and practices could be isolated, defined, and explicitly proscribed by the Commission. Specific proscriptions, in such a circumstance, would be rendered ineffectual. The seeds of such a conclusion are not to be found in this Court's recent decisions.

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are absolute." *Jaffee & Company* v. *Securities and Exchange Commission, supra,* 446 F. 2d at 391; see also, *Miller* v. *Steinbach,* 268 F. Supp. 255, 279-280 (S.D. N.Y., 1967); *Securities and Exchange Commission* v. *Resch-Cassin & Co., Inc.,* 362 F. Supp. 964 (S.D. N.Y., 1973), appeal pending, Docket No. 73-2144 (C.A. 2).

[433] See discussion, *supra,* at 170-171.

Moreover, Rule 10b-6 is an antimanipulative rule, and, as we have seen, is intended to deal with certain stabilizing problems pursuant to the Commission's authority under *both* Sections 9(a)(6) and 10(b) of the Act. And, Section 9(e) of the Securities Exchange Act *expressly* creates a private right of action against "[a]ny person who willfully participates in any act or transaction in violation of * * *" Section 9(a) of the Act. Accordingly, limitations on the right of Chris-Craft to sue Bangor Punta, and any limitations upon any recovery to be obtained for violations of Rule 10b-6, should be consistent with the terms of Section 9(e), not the parties' interpretations of this Court's decisions under Rule 10b-5.

Section 9(e) establishes its own purchaser-seller test, and its own causation-in-fact test, as a predicate to the maintenance of an express private remedy for violations of Rule 10b-6. While a prospective plaintiff under Section 9(e) must be an actual purchaser or seller of securities,[434] the section does not require the purchase or sale of a specific security. Rather, and incorporating a causation-in-fact standard, the section requires only that the purchase or sale be of "*any*

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[434] See, *e.g., Surowitz* v. *Hilton Hotels Corporation,* 342 F. 2d 596, 603 (C.A. 7, 1965); *reversed on other grounds,* 383 U.S. 363 (1966); *Copperweld* v. *Imetal,* 403 F. Supp. 579, 595 (W.D. Pa., 1975); *In re Penn Central Securities Litigation,* 347 F. Supp. 1327, 1343 (E.D. Pa., 1972); *DiJulio* v. *Digicon Inc.,* 339 F. Supp. 1284, 1291 (D. Md., 1972).

security at a price which was affected by" "any act or transaction in violation of * * *" Section 9 of the Act (emphasis supplied).[435] "[D]amages sustained as a result of any such action or transaction" may be recovered by the purchaser, and contribution proceedings are expressly authorized.[436]

Thus, Section 9(e), as noted, requires that a plaintiff prove that the defendant "willfully partici-

[435] The statutory reference to "any" security was not inadvertent. See, *e.g.*, S. Rep. No. 1455, 73d Cong., 2d Sess. 100 (1934), confirming the fact that "manipulation has also taken the form of raising and pegging the price of comparable issues * * *." Comment, *Market Manipulation and the Securities Exchange Act*, 46 Yale L.J. 624, 625 n.3 (1937); see also, Hickernell, *What Makes Stock Market Prices* 127 (1932).

[436] 15 U.S.C. 78i(e). Although, as Professor Loss has observed, "[t]here is no measure of damages specified in § 9 (e)," 3 Loss, *Securities Regulation* 1749, the courts have not hesitated to award damages for violations of Section 9. See, *e.g.*, *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787, 803-804 (C.A. 2, 1969); *Crane Co.* v. *American Standard, Inc.*, 490 F.2d 332 (C.A. 2, 1973); *Sarlie* v. *E. L. Bruce Co.*, 265 F. Supp. 371, 375-376 (S.D. N.Y., 1967) (holding that while proper measure of damages for violation of Section 9(a) would be the difference between the actual purchase price and a hypothetical purchase price in the absence of the manipulation, alternative measures of damages are also proper, including "the common law tort measure, i.e., the difference between the purchase price and the resale price where the security is sold prior to the discovery of the tort," 265 F. Supp. at 376, and a Section 11 measure, "i.e., the difference between the purchase price and the resale price where the security involved is sold prior to commencement of suit," 265 F. Supp. at 376).

pate[d]" in the manipulation."[437] In *Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. at 1386-1387, this Court stated with regard to the "specified practices" proscribed by Section 9 that the legislative history of the Section revealed:

> "an overall congressional intent to prevent 'manipulative and deceptive practices which fulfill no useful function' and to create private actions for damages stemming from 'illicit practices,' where the defendant has not acted in good faith."

Thus, where the Commission has identified an "illicit practice"—such as the practices proscribed by Rule 10b-6—and a defendant engages in such practices in the absence of "good faith," liability should be established for the purposes of Section 9, to the extent the plaintiff can demonstrate it has been damaged as a result of the "illicit practices."[438] Acts and transac-

[437] See, *e.g.*, *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787, 794 (C.A. 2, 1969); *Britton* v. *Schweickart*, CCH Fed. Sec. L. Rep. ¶ 91,029 at p. 93,436 (S.D. N.Y., 1961).

[438] The formulation of damage-causation under Section 9 (e) that was articulated by this Court in *Hochfelder*, *supra*, may be somewhat less restrictive than the lower courts previously have held. See, *e.g.*, *Rosenberg* v. *Hano*, 121 F.2d 818 (C.A. 3, 1941); *Britton* v. *Schweickart*, CCH Fed. Sec. L. Rep. ¶ 91,029 at 93,436 (S.D. N.Y., 1961); *Wolfson* v. *Parkway Management Co.*, CCH Fed. Sec. L. Rep. ¶ 91,967 at 96,294 (S.D. N.Y., 1967).

While the Commission takes no position on whether Chris-Craft has established the requisite damage-causation required by Section 9(e), it should be noted that the standard would be satisfied if Chris-Craft could show that, after Bangor Punta's alleged Rule 10b-6 violation, it was compelled to purchase Piper securities at a higher price because of the effects of Bangor Punta's violation. If Chris-Craft did so,

tions that violate Rule 10b-6 and, consequently, Section 9(a)(6), which were not the result of good faith, are committed "willfully" for the purposes of Section 9(e).[439]

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be:

1. Affirmed, insofar as it implies a private right of action on behalf of a competing tender offeror against those who have violated Section 14(e) of the Securities Exchange Act;

2. Affirmed, insofar as it imposes liability upon First Boston of not less than the maximum liability to which it would, by analogy, be subject under Section 11 of the Securities Act, but vacated and remanded to the district court for further findings to the extent it imposes upon First Boston liability in excess of that amount; and

3. Affirmed, insofar as it holds that Bangor Punta's purchases of Piper shares while Bangor Punta was engaged in a "distribution" of its own shares violated Securities Exchange Act Rule 10b-6,

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Section 28(a), as we have seen, permits the award of compensatory damages.

[439] See, *e.g.*, *Hughes* v. *Securities and Exchange Commission*, 174 F.2d 969, 976-977 (C.A. D.C., 1949). Moreover, it has long been held that "[t]he requisite purpose and willfullness [necessary to establish a cause of action under Section 9(e)] is normally inferred from the circumstances of the case," *Crane Company* v. *Westinghouse Air Brake Company*, 419 F.2d 787, 794 (C.A. 2, 1969) (citations omitted); *accord*, *TSC Indus., Inc.* v. *Northway, Inc.*, 96 S. Ct. 2126, 2140 n. 24 (1976).

and that a private right of action to remedy such a violation could be maintained.

Respectfully submitted.

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I authorize the filing of this brief.

In the brief, the Securities and Exchange Commission takes the position that a defeated contestant for control of a corporation has a cause of action for money damages against persons who injured the defeated contestant by violating Section 14(e) of the Securities Exchange Act of 1934 or Rule 10b-6 in connection with tender offers made in the course of that control contest. The United States, in its brief *amicus curiae* filed at the invitation of this Court while the case was pending on petitions for a writ of certiorari, took that position as to violations of Section 14(e) but did not find it necessary separately to address the question as to violations of Rule 10b-6.

The Commission further takes the position in this brief that, in an action brought under Section 14(e), a defendant underwriter's liability appropriately may be limited to the maximum amount that could be assessed against it under Section 11 of the Securities Act of 1933 for underwriting securities pursuant to a misleading registration statement filed under that Act if the underwriter was acting in the capacity of an underwriter rather than in the capacity of a dealer-manager and its violation of Section 14(e) is attributable solely to mere negligence. The United States, in its brief *amicus curiae*, similarly took the position that an underwriter's liability should not be limited by Section 11 where the underwriter is found to have acted with *scienter*.

The Commission has taken no position in this brief on the question whether the court of appeals correctly

computed damages in this case. The United States, in its brief *amicus curiae*, took the position that the court of appeals had followed an incorrect approach in measuring damages.

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Nos. 75-353, 75-354, and 75-355

In the Supreme Court of the United States

OCTOBER TERM, 1975

HOWARD PIPER, ET AL., PETITIONERS
v.
CHRIS-CRAFT INDUSTRIES, INC., ET AL.

THE FIRST BOSTON CORPORATION, PETITIONER
v.
CHRIS-CRAFT INDUSTRIES, INC., ET AL.

BANGOR PUNTA CORPORATION, ET AL., PETITIONERS
v.
CHRIS-CRAFT INDUSTRIES, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order of November 11, 1975, inviting the Solicitor General to express views of the United States.

QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether a defeated contestant for control of a corporation has a cause of action for money damages against persons who, by violating Section 14(e) of the Securities Exchange Act of 1934 in connection with tender offers made in the course of that control contest, deprived the defeated contestant of a fair opportunity to compete for the purchase of shares in the target company.

2. Whether in such an action, a defendant underwriter's liability is limited to the maximum amount that could be assessed against it under Section 11 of the Securities Act of 1933 for underwriting securities pursuant to a misleading registration statement filed under that Act.

3. Whether the court of appeals correctly determined damages in this case.

We do not separately address the other questions presented by petitioners—concerning, *inter alia,* the sufficiency of the evidence and the appropriateness of joint and several liability—for those questions turn largely upon the particular factual circumstances of this case and the application of well established principles of securities and tort law.

STATUTES AND REGULATION INVOLVED

Section 14(e) of the Securities Exchange Act of 1934, 48 Stat. 895, as amended, 15 U.S.C. 78n(e), provides in pertinent part:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

Section 11 of the Securities Act of 1933, 48 Stat. 82, as amended, 15 U.S.C. 77k, provides in pertinent part:

> (a) In case any part of the registration statement * * * contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security * * * may * * * sue—
>
> * * * * *
>
> (5) every underwriter with respect to such security.
>
> * * * * *
>
> (b) Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—
>
> * * * * *
>
> (3) that * * * as regards any part of the registration statement not purporting to be made on the authority of an expert * * * he had, after reasonable investigation,

> reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading * * *
>
> * * * * *

(e) The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security * * * and (1) the value thereof as of the time such was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment * * * *Provided* That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement * * * such portion of or all such damages shall not be recoverable. In no event shall any underwriter * * * be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public.

Rule 10b–6, 17 C.F.R. 240.10b–6, provides in pertinent part that it shall constitute a "manipulative or deceptive device or contrivance" under Section 10(b)

of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U.S.C. 78j(b), for "any person * * * (2) Who is the issuer or other person on whose behalf * * * a distribution is being made * * * to bid for or purchase for any account in which he has a beneficial interest, any security which is the subject of such distributions * * * or any right to purchase any such security * * *."

STATEMENT

1. BACKGROUND

This case arises out of a contest for control of Piper Aircraft Corporation (Piper), a manufacturer of light aircraft. The contestants were Chris-Craft Industries, Inc. (Chris-Craft), a manufacturer of recreational products, and Bangor Punta Corporation (Bangor Punta), a conglomerate with holdings in diversified fields. The First Boston Corporation (First Boston), an investment banking firm and also a registered broker-dealer, served as investment adviser to Piper and as underwriter for Bangor Punta. The three individual Piper petitioners (Piper family) were officers and directors of Piper and owned about 501,090 of the 1,644,890 outstanding Piper shares (J.A. A–8).[1]

Chris-Craft made its first purchase of Piper stock on December 30, 1968. On January 23, 1969, Chris-

[1] This brief summary of facts is taken from the opinion of the court of appeals in *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp.*, 480 F. 2d 341, 349–355 (C.A. 2), certiorari denied, 414 U.S. 910; A–7 to A–21 in the Joint Appendices to the petitions for a writ of certiorari (hereinafter "J.A.").

Craft announced a cash tender offer to Piper stockholders for 300,000 shares of Piper stock at $65 per share.[2] By February 3, as a result of its January tender offer and other purchases, Chris-Craft held approximately 33 percent of the outstanding shares of Piper. Chris-Craft thereafter made two exchange offers (effective May 15 and July 24) and additional purchases that brought its holdings to 42 percent of Piper's shares (J.A. A–9 to A–14).

In response to Chris-Craft's bid for control of Piper during this time, the Piper family, Bangor Punta, and First Boston took the following actions, which formed the basis of Chris-Craft's complaint:

a. On January 27, 1969, Piper sent a letter to its stockholders which stated that its board of directors "has carefully studied [the Chris-Craft January 23 cash tender] offer and is convinced that it is inadequate and not in the best interests of Piper's shareholders." The letter did not reveal that First Boston had advised Piper that the price offered was "fair and equitable" (J.A. A–11, A–38).

b. On January 29, 1969, Piper issued a press release which announced that Grumman Aircraft Engineering Corporation (Grumman) "has agreed to purchase" 300,000 shares of Piper at $65 per share. The release did not reveal that Grumman had an option to put the shares back to Piper after six months at Grumman's cost plus interest (J.A. A–11 to A–12, A–39).

[2] The closing price of Piper stock on the New York Stock Exchange on January 22, 1969, had been $52.50 per share (J.A. A–10).

c. On May 8, 1969, Piper and Bangor Punta disclosed in a press release that Bangor Punta was acquiring the Piper family's stock holdings and that Bangor Punta would make an exchange offer to the remaining Piper stockholders on a packge of Bangor Punta securities that would be valued by First Boston at not less than $80 per Piper share.[3] On May 29, Bangor Punta filed a registration statement for the proposed general exchange offer. Thereafter, on June 4, June 20, and July 25, Piper sent letters to its stockholders in which it criticized Chris-Craft's May 15 exchange offer and recommended the Bangor Punta offer. The letters did not disclose that Bangor Punta had agreed that if First Boston should determine that the package of Bangor Punta securities received by the Piper family in exchange for its shares were valued at less than $80 per share on the opening day of the general exchange offer, Bangor Punta would make up the difference if it should win control of Piper (J.A. A–14 to A–17).

d. Shortly after it announced that it would make the general exchange offer, Bangor Punta negotiated cash purchases of 120,200 shares of Piper (approxi-

[3] On May 26, the Securities and Exchange Commission brought an action against Piper and Bangor Punta in the United States District Court for the District of Columbia, charging that the May 8 press release violated Section 5(c) of the Securities Act of 1933, as amended, 15 U.S.C. 77e(c), and Rule 135, 17 C.F.R. 230.135, in that the release constituted an offer to sell securities before any registration statement had been filed (J.A. C–9 to C–15). Without admitting any of the allegations of the complaint, both defendants consented to issuance of an injunction prohibiting further such releases before filing of a registration statement (J.A. A–15, C–6).

mately 7.5 percent of the outstanding shares) in several private transactions (J.A. A–16).

e. Bangor Punta acquired another 7 percent of the outstanding Piper shares in its general exchange offer of July 18, 1969. In the prospectus issued in connection with that offer, Bangor Punta's railroad subsidiary was carried at its appraised value as of September 1965, *i.e.,* $18.4 million. First Boston acted as underwriter and dealer-manager for the offer, and in these capacities it endorsed and distributed the prospectus to Piper stockholders. Neither the preliminary nor the final prospectus, nor the First Boston opinion letter which valued the package of Bangor Punta securities at not less than $80 per Piper share, mentioned Bangor Punta's contemporaneous negotiations for the sale of the railroad for $5 million, or $13.5 million less than the amount at which it was carried on Bangor Punta's books (J.A. A–43 to A–45).[4]

[4] The Securities and Exchange Commission thereupon brought an action against Bangor Punta, charging that its registration statement and prospectus were false and misleading because they failed to disclose these negotiations, in violation of Section 17(a) of the Securities Act of 1933, as amended, 15 U.S.C. 77q(a), Section 10(b) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78j(b), and Rule 10b–5, 17 C.F.R. 240.10b–5. The district court agreed that Bangor Punta's registration statement contained misleading omissions of material fact but denied the Commission's request for an injunction, since it found that the omissions were attributable to "mere negligence" and that Bangor Punta was "unintentionally in error." The court did direct Bangor Punta, however to make an offer of rescission to Piper stockholders who had accepted the Bangor Punta exchange offer (J.A. A–143, D–1 to D–18).

A divided court of appeals affirmed the district court's denial of the injunction after hearing the Commission's appeal together with the appeals in the instant case, finding that the "didactic effect" of the damages to be assessed in this action made it unnecessary for the court to enjoin Bangor Punta for its violations (J.A. A–77 to A–93, A–100). This Court denied certiorari. 414 U.S. 910.

By September 5, Bangor Punta had acquired 51 percent of the outstanding Piper shares and therefore had won control (J.A. A–18).

2. PROCEEDINGS BELOW

a. On May 22, 1969, when the contest for control of Piper was still being waged, Chris-Craft brought suit against the Piper family, Bangor Punta, and First Boston in the United States District Court for the Southern District of New York, alleging violations of Section 5(c) of the Securities Act of 1933, as amended, 15 U.S.C. 77e(c), Rule 135, 17 C.F.R. 230.135, Sections 9, 10(b), and 14(e) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78i, 78j(b), and 78n(e), and Rules 10b–5 and 10b–6, 17 C.F.R. 240.10b–5 and 240.10b–6. The complaint sought damages and equitable relief.

On July 22, Chris-Craft moved for a preliminary injunction to prevent Bangor Punta from gaining control of Piper. The court denied the motion on the ground that Chris-Craft had failed to establish either that it would suffer irreparable injury if the motion were denied or that there was a substantial likelihood

that it would prevail on the merits (J.A. C–32 to C–48).

On expedited appeal, the court of appeals, sitting *en banc,* sustained the denial of preliminary relief on the ground that no irreparable injury had been shown. The court disagreed, however, with the district court's conclusion that there was no reasonable certainty that Chris-Craft would prevail on the merits. The court of appeals held that Bangor Punta had violated Rule 10b–6 by making cash purchases of large blocks of Piper stock shortly after announcing that it would make an exchange offer,[5] and it remanded for a determination, *inter alia,* of an appropriate remedy (J.A. C–1 to C–18).

b. On remand, Chris-Craft limited its claim for relief to damages. After a trial, the district court found that the Piper family had not misled Piper stockholders or Chris-Craft by its letters criticizing Chris-Craft's offers or by its announcement of the Grumman agreement; that, although Bangor Punta's registration statement and prospectus were "unintentionally in error" in failing to disclose the negotiations for the sale of its railroad, Chris-Craft had failed to prove either *scienter* or causal effect; and that First Boston had not engaged in any conduct which operated as a fraud upon Chris-Craft or the Piper stockholders and should not be held liable for the actions of its client (J.A. A–125 to A–162). Having thereby determined that Chris-Craft's claims were without merit, the court found it unnecessary to decide "whether

[5] Chief Judge Lumbard dissented from this holding (J.A. C–28 to C–31).

§ 14(e) may be separately invoked by one competitor for corporate control against another" (J.A. A–134).

On appeal, the court of appeals held that Chris-Craft, as a competing tender offeror, had standing to bring an action for money damages on the basis of violations of Section 14(e) of the 1934 Act. The court reasoned that the statutory objective of Section 14(e), the elimination of material omissions and misstatements in communications favoring or opposing tender offers, would be furthered by recognizing a cause of action on behalf of contestants for control who were injured by such omissions and misstatements, and that where a contestant for control has been defeated in a contest in which its opponent and others committed such violations, and the margin of victory was small, injury could be presumed (J.A. A–24 to A–33).

On the merits, the court held that the Piper family had violated Section 14(e) by making material misleading statements in its January 27 letter to stockholders, its January 29 press release and shareholder letter announcing the agreement with Grumman, and its June and July letters to stockholders (J.A. A–37 to A–41); that Bangor Punta had violated Section 14(e) by failing to disclose its negotiations for the sale of its railroad at a price far below the figure at which the railroad was carried in its registration statement and prospectus (J.A. A–41 to A–48); and that First Boston had violated Section 14(e) by failing to investigate the correctness of the carrying value of the railway after becoming aware of the negotiations for its sale (J.A. A–48 to A–55). The court further held that Bangor Punta's purchase of blocks

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of Piper stock in violation of Rule 10b-6 also had operated to deny Chris-Craft a fair chance to compete for control (J.A. A-63 to A-67).

The court remanded the case to the district court for a determination of the amount of damages, with directions to enter a judgment "assessing damages against all defendants jointly and severally" (J.A. A-69). This Court denied certiorari. 414 U.S. 910.

c. On remand, the district court awarded Chris-Craft compensatory damages of $1,673,988, plus pre-judgment interest. In computing damages, the court determined that the fair market value of Piper stock as of September 5, 1969 (the date Bangor Punta achieved majority control) was $48 per share and that the "premium value" of Chris-Craft's plurality block of Piper stock before Bangor Punta obtained control, representing the premium over fair market value that a willing buyer would have paid for an opportunity to contest with Bangor Punta, in a fair fight, for the control of Piper, was 5 percent of the fair market value, or $2.40 per share (J.A. B-43 to B-87).

The court of appeals increased the damages to $25,793,365, plus pre-judgment interest. Holding that the district court had applied an incorrect formula for computing damages, the court of appeals determined damages as the difference between the amount paid by Chris-Craft for its Piper stock (about $64 per share) and the amount that Chris-Craft could have realized upon a sale of that stock through an underwriter, after the time-consuming process of preparing and filing a registration statement following

the contest for control ($27 per share in January 1970) (J.A. B-1 to B-42).

The court of appeals denied petitioners' motion for rehearing with suggestion for rehearing *en banc* (J.A. E-3 to E-6).

ARGUMENT

1. The court of appeals correctly held that a defeated contestant for corporate control has a cause of action for money damages against persons who, by violating Section 14(e) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78n(e), in connection with tender offers made during the control contest, deprived the defeated contestant of a fair opportunity to compete for the purchase of shares in the target company. This question does not warrant further review in this case.

a. Section 14(e) makes unlawful "any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer * * * or any solicitation of security holders in opposition to or in favor of any such offer * * *." That provision, which was added to the 1934 Act by the Williams Act of 1968, 82 Stat. 457, was intended to make specifically applicable to tender offers, and to solicitations with respect to such offers, the antifraud proscriptions that had long applied to purchases and sales of securities and to proxy solicitations under earlier securities statutes and the rules adopted by the Commission thereunder. H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968); S. Rep. No. 550, 90th Cong., 1st Sess. 3, 4, 11 (1967).

There is no substantial question but that a person who is induced by fraud to accept a tender offer has a

cause of action for money damages under Section 14(e) against the person committing the fraud. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 60; cf. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730. The target corporation also would have a right to bring suit to enforce the statutory proscription in an appropriate case. Cf. *Rondeau* v. *Mosinee Paper Corp., supra*, 442 U.S. at 62–63. Similarly a shareholder of the target corporation may bring such a suit, even if he has not personally sustained an injury. Cf. *Mills* v. *Electric Auto-Lite*, 396 U.S. 375; *J. I. Case Co.* v. *Borak*, 377 U.S. 426. The question here is whether competing tender offerors, who suffer injury as a result of another's violations of Section 14(e), are also entitled to bring suit. We believe that both the legislative purpose and the statutory text require that that question be answered in the affirmative.

The legislative purpose was to ensure both "openness and truthfulness" (J.A. A–27) and fairness and equality of opportunity in connection with takeover bids. *Rondeau* v. *Mosinee Paper Corp., supra*, 422 U.S. at 58–59. See also *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F. 2d 937, 944–945 (C.A. 2). That purpose can be accomplished only by recognizing that the statute protects tender offerors as well as the target corporation and its shareholders. Moreover, the statutory text specifically proscribes, *inter alia*, deceptive practices "in connection with * * * any solicitation of security holders in *opposition* to [a tender] offer" [emphasis supplied]. Thus,

by its express terms, the statute protects tender offerors against dishonest or unfair opposition or competition. In short, tender offerors, like shareholders and management of the target corporation, are within "the class for whose especial benefit the statute was enacted." *Texas & Paper Ry. Co.* v. *Rigsby*, 241 U.S. 33, 39.

This prohibition against unfair opposition is best policed by tender offerors themselves, through private lawsuits. The individual shareholders who succumb to the fraud, either by rejecting the tender offer or by accepting that of a competitor, may not have sufficient resources or adequate incentive to contest the fraud. The target corporation and its management may, as here, be among the guilty parties. The Securities and Exchange Commission has limited resources and may not be able to monitor every corporate takeover bid. Accordingly, lawsuits by injured tender offerors provide "a necessary supplement to Commission action [,] * * * necessary to make effective the congressional purpose." *J. I. Case Co.* v. *Borak, supra*, 377 U.S. at 432–433.[8]

[8] In a case such as this, where the lawsuit is against, *inter alia*, a successful takeover bidder that acquired control in part through an exchange offer, an award of money damages might at first blush appear to have the anomalous result of imposing liability, indirectly, upon those shareholders of the target corporation who succumbed to the fraud by accepting the defendant's exchange offer. However, those shareholders may be protected against that result, as they have been here (see J.A. A–89 to A–93), by a judicial order extending to them the remedy of rescission. Of course, they will be unlikely to avail themselves of that remedy if the market value of the stock of the target corporation has declined relative to that of the securities they received in exchange.

b. Petitioners, however, rely upon the holding of *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, that only actual purchasers and sellers have a cause of action under Rule 10b–5, contend that actions under Section 14(e) similarly should be confined to actual purchasers and sellers. But the decision in *Blue Chip Stamps* was bottomed upon the fact that both Rule 10b–5 and Section 10(b) of 1934 Act, under which that Rule was promulgated, proscribed fraud only "in connection with the purchase or sale" of securities. See 421 U.S. at 732–734. In contrast, Section 14(e) contains no such purchaser-seller limitation. To the contrary, that provision also proscribes fraud in connection with solicitations in opposition to, or in competition with, a tender offer, and it is that proscription that in invoked here.[7]

Moreover, the policy considerations militating in favor of restricting private damage actions under Rule 10b–5 to purchasers and sellers are not present in litigation under Section 14(e). In *Blue Chip Stamps,* this Court observed that allowing a private cause of action by one who claimed only that he would have purchased stock but for the misrepresentation would create the potential for vexatious litigation by plaintiffs who have little chance of success at trial, and whose alleged damages would be entirely speculative, but who could obtain favorable settlements

[7] The court below was the same court that first established the *Birnbaum* rule, approved by this Court in *Blue Chip Stamps*, limiting standing under Rule 10b–5 to purchasers and sellers. *Birnbaum* v. *Newport Steel Corp.*, 193 F. 2d 461 (C.A. 2), certiorari denied, 343 U.S. 956.

because their lawsuits threaten to disrupt normal business activities (421 U.S. at 737–746). No similar consideration militates against granting a contestant for corporate control, who has risked capital in obtaining shares of the target company, a remedy at law for substantial injury caused by a competitor's violations of the securities laws.[8]

Petitioners further contend that, regardless whether there is an implied private cause of action under Section 14(e), no such cause of action arises under Rule 10b–6. That issue does not, however, appear to be presented by this case. Since Section 14(e) proscribes, *inter alia,* "manipulative acts or practices in connection with any tender offer," a right of action under that provision necessarily embraces a cause of action for any manipulative act or practice committed in connection with the tender offer, including acts more specifically proscribed by Rule 10b–6.

c. The question of the proper scope of the right of action under Section 14(e) concededly is one of substantial importance to persons engaged in contests for corporate control, and of some importance to the securities industry generally. But two courts of appeals already have expressly accepted and relied upon the decision in the instant case in addressing this

[8] Moreover, in *Blue Chip Stamps* the Court observed that the common law tort of misrepresentation had evolved in the context of business dealings among persons known to each other (421 U.S. at 744–745). A contestant for corporate control who loses his investment as a result of the misrepresentations of another contestant, unlike a potential purchaser of securities, is in a position closely analogous to one whose prospective advantage in a business relationship is tortiously intruded upon (see J.A. A–30).

question. *Smallwood* v. *Pearl Brewing Co.*, 489 F. 2d 579 (C.A. 5); *H. K. Porter Co., Inc.* v. *Nicholson File Co.*, 482 F. 2d 421 (C.A. 1)). No court of appeals has rejected the decision below in considering this question.[9] If anything, therefore, there may be less reason to review this issue now than when this Court previously denied certiorari in this case (414 U.S. 910). Accordingly, in view of the manifest correctness of the decision below, the absence of any direct conflict among the courts of appeals, and this Court's previous denial of certiorari on the same issue in this case, we do not believe that this issue warrants review at this time.

2. In our view, an underwriter, such as petitioner First Boston, who violates Section 14(e) of the 1934 Act may be held liable for money damages in excess of the maximum liability that could be assessed against

[9] But cf. *Klaus* v. *Hi-Shear Corp.*, C.A. 9, Nos. 75–1544 *et al.*, decided December 15, 1975. In *Klaus*, involving a contest for control of Hi-Shear Corporation, the court of appeals reversed the district court's grant of a contestant's motion for a preliminary injunction against the voting of a particular block of stock held by management, which opposed the contestant. The court of appeals reasoned that, although the contestant had been misled to his detriment by management's misrepresentation that his tender offer, if successful, would result in the contestant obtaining majority control (when in fact management intended to dilute the voting power of his shares by issuing the block in question), nevertheless the contestant, to succeed in his suit for injunctive relief, would have to show irreparable harm to the cash tender offerees, not to himself, since the Williams Act was not intended to protect him (slip op. 10). This ruling was not necessary to the court's holding, however, for the court went on to decide that any delay in the disenfranchisement of the block of stock would not cause the contestant irreparable harm (slip op. 13). The court did not refer to the instant case.

it under Section 11 of the 1933 Act, as amended, 15 U.S.C. 77k ("the total price at which the securities underwritten by him * * * were offered to the public") in a suit brought by a purchaser for a material misstatement or omission in a registration statement.[10] The limitation placed on an underwriter's liability under the 1933 Act simply recognizes that the loss suffered by a defrauded purchaser will not exceed the price he paid for the securities. In contrast, violations of Section 14(e) may cause losses in excess of the price at which the securities were offered to the public; the losses incurred by an unsuccessful contestant for corporate control as a result of the deceptive practices of a competitor's underwriter may well exceed the total price at which the competitor's securities were offered.

Nothing in the 1934 Act would bar the award of fully compensatory damages in such circumstances, and to make such relief available seems to be in accord with the general policy of the securities laws. Accordingly, we believe that it would be improper to apply the Section 11 limitation, which might prevent the award of full compensation, to a situation where by its literal terms it does not apply.

Moreover, liability under Section 11 is imposed even where the underwriter is guilty only of a failure to observe due diligence. See Section 11(b); *Escott* v. *BarChris Construction Corp.*, 283 F. Supp. 643 (S.D.

[10] By holding First Boston jointly and severally liable for more than $25 million plus pre-judgment interest, the court of appeals imposed a potential liability approximately three times as great as could have been imposed under Section 11 of the 1933 Act.

N.Y.); *Feit* v. *Leasco Data Processing Equipment Corp.*, 332 F. Supp. 544 (E.D. N.Y.) As the court of appeals noted, however, "§ 14(e) imposes liability upon an underwriter in favor of a competing offeror * * * as an aider and abettor of the issuer *if* he was aware of a material falsity in the registration statement or was reckless in determining whether material falsity existed" (JA. A–49; emphasis added). Here, the court found that First Boston's conduct went "far beyond mere negligence" (J.A. A–54, n. 24), and "amounted to an almost complete abdication of its responsibility to potential investors" (J.A. A–55). Since the court of appeals imposed a requirement of *scienter* in finding a violation of Section 14 (e), it would have been inappropriate to limit liability to that which could arise from mere negligence under Section 11.

The scope of an underwriter's liability under Section 14(e) is a matter of substantial importance to the securities industry. But neither the court of appeals nor any other court has expressly passed on this question.[11] Accordingly, if this Court were to grant review on this issue, it would be placed in the inappropriate position of deciding an important question as a matter of first impression, without the benefit of the views of any lower court. In these circum-

[11] The question was presented to the court of appeals for the first time in a petition for rehearing, with suggestion for rehearing *en banc*, that was supported by the Securities and Exchange Commission. The court denied the petition without opinion (J.A. E–3 to E–8).

stances, the Court should not initially undertake to decide this question.[12]

3. The court of appeals measured damages by comparing Chris-Craft's holdings in Piper stock valued as a plurality block with incipient control before Bangor Punta acquired actual control in September 1969, with the same holdings valued as an illiquid minority block thereafter. The court determined that the value of Chris-Craft's plurality holdings had been approximately $64 per share (Chris-Craft's average cost) and that the value of the minority block was only $27 per share (the amount Chris-Craft would have realized upon a public sale held at the earliest feasible date following the end of the control contest) (J.A. B–21 to B–32).

a. We believe it would have been preferable for the court of appeals to have measured damages not from Chris-Craft's plurality position but rather from the control position Chris-Craft might have achieved but for petitioners' violations of the securities laws. The approach followed by the court compensated Chris-Craft only for the immediate economic injury occasioned by the loss of the control contest and not for the loss of its expectancy interest in gaining control. It may be assumed that the per share value of a con-

[12] However, in view of the importance of this issue to the private parties here, the court may consider it appropriate to grant First Boston's petition for a writ of certiorari for the limited purpose of vacating the judgment below and remanding to the court of appeals for explicit consideration of the proper scope of its liability as an underwriter.

trolling block of shares is greater than that of only a plurality block; indeed, Bangor Punta paid $70 to $80 per share for its controlling block (J.A. B–26). This suggests that the value of Chris-Craft's holdings, as of September 1969, would have substantially exceeded its average cost of $64 per share if it had succeeded in obtaining control, an objective that was frustrated by petitioners' violations. Considerations of equity, as well as full effectuation of the legislative policies underlying the Williams Act, require the award of expectancy damages, measured from the value the defeated contestant's holdings would have had if it had gained control.

Expectancy damages should, however, be discounted by the likelihood that the defeated contestant would have lost the control contest even in the absence of any violations of the securities laws.[13] The award of undiscounted damages would risk substantial overcompensation of the defeated contestant for control. In this case, for example, although Chris-Craft was able to acquire 42 percent of the outstanding Piper stock even in the face of petitioners' violations, and over one-fourth of Bangor Punta's 51 percent share was acquired unlawfully, there may have been a possibility that Chris-Craft would have lost that contest

[13] The court of appeals' use of the value of a plurality block of shares, rather than a control block, as the starting point for measuring damages may have been intended as an implicit discounting mechanism. We believe, however, that it is analytically preferable to consider the worth of the prize separately from the likelihood of winning it.

even in the absence of any violations of the securities laws.

In individual cases, however, the approach we suggest here may generate damage determinations roughly comparable to those resulting from that used by the court of appeals. As indicated above, the court of appeals assessed damages at $37 per share (the difference between $64 and $27 per share).[14] Almost identical damages would have been awarded under

[14] We question whether the court of appeals' valuation of Chris-Craft's illiquid minority block of stock at $27 per share was correct. That figure represents the net amount Chris-Craft could have realized from a public sale in January 1970, a date that was picked because the court estimated that the process of preparing and filing a registration statement for a public sale would take at least four months from the time the injury had become complete in September 1969 (J.A. B–29 to B–30). But since the district court had found that the market value of Piper stock was $48 per share immediately after Bangor Punta acquired control in September 1969 (J.A. B–57), and there was evidence that at that time a public sale of Piper stock would have produced net proceeds of between $41.60 and $43.50 per share (J.A. B–29), the use of the January 1970 date appears to compensate Chris-Craft for a loss caused by a post-injury decline in the market value of Piper stock of approximately $15 per share—a loss that Chris-Craft would have sustained even if petitioners had not violated the securities laws and, indeed, even if Chris-Craft itself had succeeded in the contest for control (Chris-Craft has never contended that it would have divested its shares upon securing majority control, or that it could have sold a minority block in a public sale in Septmber 1969). But although the question whether petitioners should be required to compensate Chris-Craft for losses attributable to a decline in the market value of Piper stock occurring after the end of the control contest is important to the determination of damages in this case, it does not appear to be of sufficient general importance to warrant review by this Court.

our approach if the value of a control block at the time Bangor Punta obtained control had been determined to be $77 per share (as a court might have decided in view of the price paid by Bangor Punta), and the probability that Chris-Craft would have won the control contest in the absence of any violations of the securities laws to be 75 percent ((77—27)×.75=50×.75=37.5). Accordingly, we cannot say that the court of appeals would have arrived at a substantially different determination of damages if it had followed the approach we suggested here.

b. The question of the proper measure of damages for loss of opportunity to gain corporate control in consequence of a violation of Section 14(e) is important because as a practical matter it is the method of fixing damages that determines the effectiveness of the private right of action as a tool for enforcing the proscriptions of Section 14(e). Moreover, use of an incorrect measure could distort the allocation of risks in contests for corporate control. Thus if this Court grants review of the question whether a competing tender offeror has a right of action under Section 14(e), it would be appropriate also to review the court of appeals' determination of damages. But the proper measure of damages in a case such as this does not appear to be a matter of such general importance as independently to warrant this Court's attention at this time.

CONCLUSION

For the foregoing reasons, the questions presented do not warrant review by this Court.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-353

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and WILLIAM T. PIPER, JR.,
Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC., et al.,
Respondents.

REPLY BRIEF FOR PETITIONERS HOWARD PIPER, THOMAS F. PIPER AND WILLIAM T. PIPER, JR. TO THE BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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March 4, 1976

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REPLY BRIEF FOR PETITIONERS HOWARD PIPER, THOMAS F. PIPER AND WILLIAM T. PIPER, JR. TO THE BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

The Piper individuals respectfully submit this reply to the brief submitted by the United States Securities and Exchange Commission ("SEC") as *amicus curiae*.

The *amicus* brief concludes that this Court should not review the questions presented by the three petitions for certiorari although it acknowledges that many questions presented are important ones. While disagreeing with the rulings of the court below in several vital particulars, the brief suggests that this Court not review them at this time. In so doing, the brief ignores the cumulative effect of each of the admittedly erroneous determinations. If left undisturbed, those determinations will have far reaching

ramifications for the courts and the business community, particularly in light of the present volume of takeover bids.

We are constrained to submit this reply brief in order to refocus the Court's attention on the important issues raised in the Piper individuals' petition for certiorari since the *amicus* brief either distorts or ignores them.

Causation

The *amicus* brief concedes that the decisions below did not find that the Piper individuals caused injury to Chris-Craft. Thus, it acknowledges the complete absence of findings of causation in fact. In place of such findings the *amicus* brief acknowledges that the decision below held that "where a contestant for control has been defeated in a contest in which its opponent and others committed such violations [of Section 14(e)], and the margin of victory was small, *injury could be presumed*" (*Amicus* Brief, p. 11; emphasis added). It is the propriety of indulging in such a presumption that we submit warrants review by this Court.

The *amicus* brief attempts to avoid the causation problem by substituting standing to sue. It asserts that granting standing to sue to a defeated contestant for control is consistent with the legislative purpose of Section 14(e). Since the purchaser-seller limitation of Rule 10b-5 is not present in Section 14(e), it attempts to distinguish the policy considerations of *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723. There, this Court denied standing because of the potential for vexatious litigation by plaintiffs whose alleged damages would be entirely speculative. The *amicus* brief argues that a contestant for corporate control who risks capital in obtaining shares of the target company is for unexplained reasons not in that position and should have a remedy at law for injury caused by a competitor's violations of the securities laws (*Amicus* Brief, p. 17). That position, however, serves to highlight the problem illustrated by the basis upon which the court below found the Piper individuals liable to pay over $36 million in "damages."

Their liability was premised solely on the alleged inability of Chris-Craft to purchase additional shares on its cash tender offer in January 1969 (although Chris-Craft was tendered more shares than it had sought). That shareholders did not tender their shares to Chris-Craft for reasons unrelated to the alleged misrepresentations is ignored. That the Piper shareholders who did not tender to Chris-Craft on its $65 offer were subsequently offered from $70 to $80 a share is ignored. That the court below specifically found that nothing the Piper individuals did after January 29 caused injury to Chris-Craft is also ignored.* Hence, by giving Chris-Craft a cause of action and then giving it the benefit of the presumption that it was denied the opportunity to purchase an unspecified number of shares in January, the court below dispensed entirely with proof that the January events caused injury in September when Bangor Punta acquired control. The *amicus* brief does not deny that this anomalous result is worthy of review by this Court; it merely overlooks the issue.

Joint and Several Liability

The *amicus* brief declines to address the question of joint and several liability, asserting that the question turns

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* Although the *amicus* brief refers to letters sent by Piper to its shareholders on June 4, June 20 and July 25, which did not mention an additional consideration possibility, the court below specifically found that those letters caused no injury to Chris-Craft (A-63). Indeed, even Chris-Craft conceded that the additional consideration provisions were fully described in Bangor Punta's preliminary registration statement in May and its final prospectus in July, both of which had been cleared by the SEC with full knowledge of the facts (426A, 428A-430A).

largely upon particular factual circumstances and the application of "well established principles of securities and tort law" (*Amicus* Brief, p. 2). As we pointed out in our original petition (pp. 15-18) and our reply to Chris-Craft's brief (pp. 4-5), those principles militate against such liability. At most, the situation involves successive tortfeasors whose respective liability to Chris-Craft must be limited to such damages as were caused by their acts.

The result of the position taken by the court below is to give defeated contestants in tender offers a potent weapon to silence management. If the purpose of Section 14(e) is to ensure both "openness and truthfulness" and "fairness and equality of opportunity in connection with takeover bids" (*Amicus* Brief, p. 14), to permit the imposition of joint and several liability to stand here will achieve the opposite result.

Management of the target corporation is duty bound to inform shareholders of its honest opinion on takeover bids. Management's opinion that the $65 offer was inadequate proved to be factually true. Its opinion that the Grumman transaction was perceived as a better alternative to Chris-Craft is undenied. Nevertheless three members of management are being penalized by being held jointly and severally liable with Bangor Punta which offered shareholders more per share and succeeded in acquiring control more than six months later, by means of alleged securities act violations in which the Piper individuals are not even claimed to have participated. Whatever "well established principles of securities and tort law" may apply to the imposition of joint and several liability, they were not present here.

Such liability will effectively silence management in future contested takeovers to the detriment of shareholders. Management would be foolhardy to seek another contestant if it put itself in the position in which the Piper individuals now find themselves. The shareholders thus will

be deprived of the benefit of a competitive bid for control and will have to accept the first offer made.

Damages

The *amicus* brief disagrees completely with the assessment of damages by the court below. It acknowledges that the question of the proper measure of damages is important to the administration of Section 14(e). Nevertheless it suggests that this Court not grant review of the question at this time for obscure reasons totally ignoring the draconian injustice to three individuals facing bankruptcy if the judgment stands.

These petitions, however, present the Court with the seminal case under Section 14(e) in contested takeover situations. It has before it a complete record and every party usually appearing in such situations, viz. the unsuccessful contestant, members of the target corporation's management, the successful contestant and the advisor and underwriter. Each defendant played a different role in the contest, each was found liable for different alleged violations, each alleged violation contributed differently, if at all, to the outcome of the contest and yet each defendant was found liable to pay the same amount in "damages." That amount admittedly was calculated based upon a presumed rather than a proven injury. The courts, the securities industry and businessmen should not be required to wait another 20 years before this Court renders its definitive opinion on questions of such importance to them as are presented by this case. The injustice of the decisions below to the Piper individuals should not be ignored by this Court.

CONCLUSION

For the reasons stated in the petition, in the reply brief and herein a writ of certiorari should issue.

Respectfully submitted,

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March 4, 1976

Certificate of Service.

I hereby certify that three copies of the foregoing Reply Brief for Petitioners were served by hand this 4th day of March on Arthur L. Liman, Esq., 345 Park Avenue, New York, New York 10022, counsel for Respondent. I further certify that all parties required to be served have been served.

Dated: March 4, 1976.

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Supreme Court, U. S.
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No. 75-355

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Respondents.

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RESPONSE OF PETITIONERS BANGOR PUNTA CORPORATION, NICOLAS M. SALGO AND DAVID W. WALLACE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted by Petitioners Bangor Punta Corporation ("BPC"), Nicolas M. Salgo and David W. Wallace in reply to the brief filed on February 27, 1976 expressing the views of the United States Securities and Exchange Commission ("SEC Brief").

The SEC Brief concludes by opposing certiorari in this case despite its recognition of the "substantial importance" of several questions presented and its acknowledgment of errors below that increased damages by more than $15,000,000. With all due respect to the SEC's interest in expanding private damage actions, this attempt to dissuade the Court from reviewing a major case should not be allowed to succeed.

1. The "Standing" Issues

The SEC Brief concedes that the question whether offerors can sue for money damages under Section 14(e) is one of "substantial importance," *id.* at 17, a term whose significance is quite familiar to the Solicitor General. See Sup. Ct. Rule 19. The SEC Brief nonetheless opposes review of this issue on two erroneous grounds.

a. The SEC Brief belittles the clear conflict that arose on December 15, 1975 when the Ninth Circuit decided the case of *Klaus* v. *Hi-Shear Corporation.** In *Klaus,* the Ninth Circuit ruled, citing this Court's decision in *Rondeau,* that injuries to tender offerors, like CCI, are not remediable under Section 14(e) of the 1934 Act because that Section "was designed to protect . . . offerees, not offerors." App. at 11-A. If *Klaus* were followed in the instant case, the entire basis for the judgment against BPC would disappear.**

* The opinion of the Court of Appeals for the Ninth Circuit is reprinted in the Appendix ("App.") to this brief.

** The SEC Brief implicitly concedes that the Second Circuit's invention of damage liability under Rule 10b-6 in favor of CCI, a non-purchaser, cannot stand after *Blue Chip Stamps* and that the Second Circuit's attempt to distinguish its own *Birnbaum* ruling on this point is frivolous. The SEC Brief suggests that Rule 10b-6 might nevertheless be invoked as defining a separate violation under Section 14(e). Even if this theory were either timely or plausible, the judgment below would rest entirely on the existence of a damage remedy under Section 14(e) in favor of an offeror, which *Klaus* would plainly preclude. In fact, the SEC Brief's assertion that the 10b-6 issue "does not, however, appear to be presented by this case," id. at 17, is contrary to the understanding of every party and every previous court. Justice requires that the Second Circuit's erroneous ruling on this point be reviewed and reversed under *Blue Chip Stamps.*

The *Klaus* case thus presents a direct conflict between circuits on an issue decisive of the case at bar and conceded by the SEC Brief to be of "substantial importance." The SEC Brief seeks to dismiss the Ninth Circuit's fully considered holding on the scope of Section 14(e) by speculating that some remarks later in the court's opinion on a point of California law (See App. at 14-A) might, if applied more broadly than the court actually did, have produced the same result the court reached by following *Rondeau.* These remarks, which fall well below the level of even an alternative holding, cannot justify ignoring the plain holding in *Klaus* and the clear conflict between the circuits.

b. The SEC Brief then tries to defend the decision below on the ground that Section 14(e) protects "competition" and "competitors." This argument is constructed out of imaginary cloth and begs the question. As this Court held in *Rondeau,* the Williams Act protects only *target shareholders* from misinformation in solicitations "in favor of" or "in opposition to" a tender offer. Both Committee Reports emphasized that the purpose of Section 14(e) was to impose on persons "making" or "opposing" tender offers an obligation of full disclosure *"to those with whom they deal."** That purpose was fully served, as far as BPC's violation was concerned, by the rescission offer it was ordered to make to the Piper shareholders, and if an offeror has standing to sue at all, it can and should be limited to that type of remedy for the protected shareholder class. Not a word in the statute (or that we have found in its legislative history) suggests that offerors were to have an additional damage remedy for themselves, much less that

* S. Rep. No. 550, 90th Cong., 1st Sess. (1967) at 11; H. Rep. No. 1711, 90th Cong., 2d Sess. (1968) at 11 (emphasis supplied).

competing offerors were to be able to sue each other for relief that provides no benefit to (indeed, further injures) any target shareholder who was misled.

2. The Scienter and Causation Issues

The SEC Brief acknowledges the district court's ruling that "Chris-Craft had failed to prove either scienter or causal effect." SEC Brief at 10. As to scienter, the SEC Brief does not even comment on the Court of Appeals' disregard of the district court's finding of lack of scienter, nor does it mention the *Hochfelder* case on the relevance of scienter to damages in securities cases.* As to causation, the SEC Brief acknowledges that the Court of Appeals presumed causation as a matter of law. *Id.* at 10. Yet it does not discuss the extraordinary manner in which the Court of Appeals formulated its new rule of law by reading the *Mills* case (which merely held that a material omission in a proxy statement taints an election and may require revoting) as conclusively establishing the causation that the district court found plaintiff failed to prove.**

3. The Damages Issues

The SEC Brief admits both that the Court of Appeals erred seriously on damages and that the issues are important. It then tries to justify non-review by calculations

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* The SEC has argued in this Court in *Hochfelder* that scienter should *not* be required, but it has done so on the basis of proposed limitations on standing that are inconsistent with its position in this case. See BPC's Petition at 16, where the SEC's *Hochfelder* Brief is quoted. The present SEC Brief does not mention this inconsistency.

** To add insult the Brief appears to characterize BPC's challenges to this use of newly invented rules of law to override findings of fact as questions turning on "the sufficiency of evidence." SEC Brief at 2. BPC *won* essentially every evidentiary issue relevant to the questions presented in three different trials. Then, under the continuous guidance of the SEC, the Court of Appeals repeatedly circumvented the findings with new rules of law.

based on applying a theory never before argued to facts invented to reach a predetermined result.

a. The SEC Brief concedes in footnote 14 that the Court of Appeals' rule of damages erroneously compensates Chris-Craft for a post-injury decline in market value

> "that Chris-Craft would have sustained even if petitioners had not violated the securities laws and, indeed, even if Chris-Craft had succeeded in the contest for control." *Id.* at 23.

The SEC Brief puts the amount of the error at $15 per share, thus conceding that over $10,000,000 of the damages the Court of Appeals assessed against petitioners (approximately $15,000,000 when interest is included), was based on an erroneous rule of law. *Ibid.* If an error of this magnitude were not itself a sufficient basis for review, the SEC Brief concedes that the legal question of the proper measure of damages for loss of an opportunity to gain control is "important," because "use of an incorrect measure could distort the allocation of risks in contests for control." *Id.* at 24.

b. In addition to this $15,000,000 error, the SEC Brief also concedes that the Court of Appeals erroneously failed to discount the damages to account for the probability that CCI would have lost the control contest anyway. *Id.* at 27. The brand new theory of damages advanced in the SEC Brief does not cure either error, and the new theory itself is both illogical and unjust.

The SEC Brief tries to get rid of the discount issue by inventing a discount rate (.75) and then inventing a value for controlling shares ($77) that "a court might" have found. SEC Brief at 24. Thus "findings" by an amicus curiae patch up clearly erroneous "findings" by the Court of Appeals, all in disregard of the only court that heard evidence. This is especially unfair because both the logic

and the arithmetic are also wrong. Even the Court of Appeals acknowledged that it could not find any higher value for controlling shares than $64 without remanding for the taking of evidence. JA at B-25. As to the arithmetic, the Brief at 24 proposes the equation (77 – 27) x .75 = 37.5. But the first and third numbers on the left side, 77 and .75, are newly proposed numbers not considered by any court; and the middle number, 27, reflects the $15 per share "market-loss" error conceded by the SEC Brief itself in footnote 14.

c. The District Court found that damages for the loss of the opportunity to compete for control were $1,673,988 ($2.40 per share) before interest. The Court of Appeals fixed damages fifteen times higher on a new theory without a trial (and without taking into account the fact that Chris-Craft still has the opportunity to gain control). Without even commenting on the unfairness of this procedure, the SEC Brief compounds it by (i) inventing still another theory not even suggested below, (ii) "finding" a price and a discount rate not found by any court, and then (iii) suggesting that this Court disregard the $15,000,000 discrepancy that exists even on this new theory because the question is not of "sufficient general importance" even though the damage theory itself presents an "important question." The suggestion that this "important question" be postponed to some later hearing in some later case, while BPC and its shareholders are forced to pay damages that are admittedly $15,000,000 too high, reflects a cavalier approach to this Court's certiorari jurisdiction.

4. The 1933 Act Issues

There is no basis for the suggestion in the SEC Brief, at footnote 12, that the case might be remanded with respect to First Boston only. First, it is anomalous for the Brief to suggest remand on the damages issue it contends was correctly decided while opposing remand or review of the damages issue it concedes was incorrectly decided. See pp. 4-6, *supra*. Second, First Boston was held jointly and

severally liable with BPC and five individuals, including Petitioners Salgo and Wallace, all of whom have defenses based on Section 11 issues similar to that considered in footnote 12. Section 11(g) of the 1933 Act limits the amount recoverable against BPC, Salgo and Wallace on account of the exchange offer to "the price at which the [BPC] security was offered to the public," an amount which in this case is the same dollar limit claimed by First Boston.

The SEC seeks to avoid the Section 11 limitations by contending that there was a finding of scienter. This contention is contrary to the express findings of the District Court, recognized in the SEC Brief at 8 and 10. The 1933 Act issues should be reviewed along with the other questions of "substantial importance" presented by the Petitions.

Conclusion

Because the SEC Brief concedes that at least three of the questions presented are "important", because one of them involves a clear conflict between circuits and another involves an equally clear $15,000,000 error, and because the other issues presented in BPC's Petition are of major importance, the Petition for Certiorari should be granted.

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March 4, 1976

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK A. KLAUS, *Plaintiff-Appellant,* vs. HI-SHEAR CORPORATION, SOUTHERN CALIFORNIA SIGNAL INDUSTRIES, INC., CASPIAN, INC., GEORGE S. WING, VENE L. DARBY, WILLIAM HALPERN, PERRY A. LUTH, HOWARD TOMRINSON and HENRY UGARTE, WESTERN METHODS CORP., GENE GREGORY, HI-SHEAR CARIBE, *Defendants-Appellees.*	No. 75-1544 No. 75-1920 OPINION
FRANK A. KLAUS, *Plaintiff-Appellee,* vs. HI-SHEAR CORPORATION, a California corporation, and HI-SHEAR CARIBE, a California corporation, *Defendants-Appellants.*	No. 75-1389 No. 75-1394 No. 75-2380 No. 75-2446
FRANK A. KLAUS, *Plaintiff-Appellee,* vs. GEORGE S. WING and PERRY A. LUTH, *Defendants-Appellants.*	No. 75-2012

[December 15, 1975]

On Appeal from the United States District Court
for the Central District of California

Before: CHOY and GOODWIN, *Circuit Judges,*
and TAYLOR,* *District Judge.*

* Honorable Fred M. Taylor, United States District Judge, District of Idaho, sitting by designation.

CHOY, Circuit Judge: Since early 1973, Frank A. Klaus has been attempting to wrest control of Hi-Shear Corporation away from George S. Wing and his allies, Hi-Shear's present management. Klaus is conducting litigation in district court in which he charges that the Wing group, in its effort to retain control of Hi-Shear, has violated federal and state securities laws and regulations. In a running endeavor to stabilize the battle for control, pending its decision on the merits, the district court issued over a period of months a number of preliminary injunctions against the voting of certain shares of stock. It refused to issue other injunctions requested by Klaus. One side or the other appeals from each order entered by the district court.

All the preliminary injunctions were improperly issued because they were based on a mistaken theory of the law. The plaintiff could not establish a likelihood of success under the Exchange Act claims, so no injunctions should issue on that basis. The ESOT injunction was improper in the circumstances here because plaintiff could not establish irreparable harm. The Caribe injunction and the Midwood order were improper for failure to join an indispensable party, and the injunction on the exercise on stock options was improper as untimely.

We affirm in part, reverse in part and remand.

History of the Litigation

Hi-Shear is a successful California corporation, founded in 1943 by Wing. Wing serves as president and chairman of the board. Klaus first tried to acquire control of Hi-Shear in April 1973 by making a cash tender offer for all outstanding stock. Hi-Shear's management countered by purchasing over 660,000 shares from its shareholders pursuant to its own tender offer. Rather than retain them all as non-voting treasury shares, Hi-Shear resold 130,000 of the shares at cost to its wholly-owned subsidiary Hi-Shear (Caribe). Hi-Shear reported to its shareholders and to the Securities and Exchange Commission (SEC) that it had

purchased all of the 600,000 some shares. The district court found that Hi-Shear intended to convey the impression that only Hi-Shear had purchased the shares.

Klaus made a second tender offer on August 8, 1974, for a certain number of shares which he thought necessary for majority control. When his second offer closed on October 4, 1974, Klaus held 555,514 of Hi-Shear's 1,231,816 outstanding votable shares—about 45 percent. If the 130,000 shares held by Caribe had been non-votable treasury stock, as Klaus then believed, Klaus would have held over 50 percent of the total shares on October 4. At this point, Klaus demanded a special meeting of stockholders for an election of new directors. *See* Cal. Corp. Code § 2202. The meeting was scheduled for December 20, 1974.

During October 1974, Hi-Shear's management approved three stock issuances which resulted in Klaus' controlling a much smaller percentage of the total stock. On October 11, management issued 50,000 shares in exchange for all the stock of Southern California Signal Industries, Inc. (Signal), a machine shop. Under the acquisition agreement, Hi-Shear's management was granted an irrevocable proxy to vote the shares transferred to Signal's former owner.

On October 15, management approved formation of an Employee Stock Ownership Trust (ESOT). Hi-Shear donated to ESOT 30,000 treasury shares and guaranteed a bank loan with which ESOT purchased another 50,000 shares from Hi-Shear at market value.

Finally, on October 31, Hi-Shear acquired another shop, Western Methods Corporation (Western). Hi-Shear paid for Western by issuing 100,000 shares to Western's owner. The sale agreement allowed the seller to rescind the sale if Klaus later should obtain control of Hi-Shear, so long as the seller himself did not vote his 100,000 shares for Klaus.

On October 18, Klaus responded to these maneuvers with a suit in district court alleging violations of sections 10(b) and 14(e) of the Securities Exchange Act of 1934, 15 U. S. C.

§§78j(b), 78n(e). Amendments to his complaint also alleged violations of section 14(a) of the Act, 15, U. S. C. § 78n(a), and of management's fiduciary duties under state law. He requested rescission of the stock transfers to Signal, and injunctions against the voting of those shares transferred and against any future transfers pursuant to the Signal agreement. On November 7, he amended his complaint to request similar relief as to ESOT and Western transfers.

During November, Klaus apparently learned for the first time that the Caribe shares were outstanding shares, which management intended to vote. On December 13, he again amended his complaint, asserting that the Caribe shares could not be voted under California law and asking that their voting be enjoined. On December 19, the eve of the special election, the court issued a temporary restraining order against the voting of the Caribe shares. The next day, Klaus nevertheless lost his bid for control, as the newly-issued Signal, ESOT, and Western shares were voted for management.

The court scheduled hearings for December 10-13, 1974, on Klaus' motions for preliminary injunctions. In subsequent weeks, the court issued a number of orders granting or refusing preliminary injunctions pending a decision on the merits of Klaus' amended complaint.

District Court Orders

January 13—Order granting "Caribe Injunction"—The Court noted its intention to grant a preliminary injunction barring the voting of Caribe's 130,000 shares. At this time, Caribe was not a named party in the action. On January 28, and 29, Caribe sold 128,000 of its Hi-Shear shares to Midwood Industries. Klaus added Caribe as a defendant in his third amended complaint on February 4.

January 14—"Rule 62c Injunction"—The court ordered Hi-Shear to hold its regular annual meeting of stockholders, which had not been held in 1974, no later than February 28, 1975. It also ordered Hi-Shear to issue no new stock before the annual meeting. The court stated that the injunction

was issued pursuant to Fed. R. Civ. P. 62c (Injunction Pending Appeal), apparently in anticipation of appeals from orders which were not formally announced until February 5.

February 5—Order denying Klaus' motions for preliminary injunctions against the voting of the shares issued to Signal and Western Methods.

February 5—"ESOT Injunction"—The court issued a preliminary injunction barring the voting or counting of shares held by ESOT.

February 5—"Caribe Injunction"—The court issued a preliminary injunction against the voting of the Hi-Shear stock held by Caribe.

February 12—"Midwood Order"—The court extended the Caribe Injunction to forbid the voting of the 128,000 shares which Caribe had transfererd to Midwood, and barred their being voted by any future transferee.

February 13—Order denying Hi-Shear's motion to modify the ESOT trust agreement to permit ESOT's Hi-Shear stock to be voted by its employee beneficiaries rather than by the ESOT committee which was under the influence of Hi-Shear's management.

After the December hearings which resulted in these orders, Hi-Shear's management encouraged its employees to exercise stock options which had previously been issued to them. Under an option plan adopted in 1972, holders could exercise their options by executing a note to Hi-Shear in payment for the purchased shares. Management now provided its employees forms for long-term promissory notes and offered them rescission agreements binding Hi-Shear to repurchase the stock if Klaus should gain control. By January 14, when the Rule 62c Injunction banned further stock issuances, Hi-Shear employees had exercised options for 71,000 shares, 27,000 of them by Vice President Perry A. Luth, but the certificates were not delivered until January 22. The court held that issuance of the certificates violated the Rule 62c Injunction, and another series of orders was forthcoming:

February 26—"Temporary Restraining Order" and "Preliminary Injunction in Aid of Jurisdiction of Court (28 U.S.C. § 1651(a) [All Writs Act])"—The court enjoined Luth from voting his 27,000 shares and enjoined President Wing from voting a number of his own shares equal to those issued under the 1972 stock option plan to non-party employees not within the court's jurisdiction.

The court-ordered 1974 annual meeting was held on February 28, 1975. Management defeated Klaus 615,453 to 593,687. Injunctions prevented another 281,000 shares from being cast for management.

April 1—"Stock Options Injunction"—The court issued a preliminary injunction, after a March 14 hearing, restating the February 26 orders.

April 2—"Second Rule 62c Injunction"—The court extended the terms of the first Rule 62c Injunction past its original February 28 expiration date. The court also enjoined Hi-Shear and its subsidiaries from changing their articles of incorporation to affect the rights of stockholders, and, *inter alia,* from merging, entering into certain employment contracts, and disposing of capital assets outside the ordinary course of business.

Findings and Conclusions

The court's orders granting or denying injunctions were the result of the following findings of fact and conclusions of law:

The agreement establishing ESOT provided that the Hi-Shear shares held in trust would be voted as directed by the ESOT committee. The court held that this provision constituted a proxy solicited by management. Because no proxy statement had been filed with the SEC, management was found in violation of section 14(a) and rule 14a, 17 C. F. R. § 240.14a. The court also found that management's public statements that Klaus' second tender offer, if successful, would result in Klaus' obtaining majority control were false and misleading. The court believed that at the

time the statements were issued, management intended to dilute the voting power of Klaus' shares by issuing the ESOT (as well as the Signal and Western) shares and thus prevent Klaus from obtaining control. The court held that management thus violated section 14(e) of the Act. The court also held that management's conduct in establishing and transferring shares to ESOT were in violation of California law.

In denying Klaus' motions for injunctions against the voting of the Signal and Western shares, the court held that Klaus had not sufficiently demonstrated violations of sections 14(a) or 14(e). It found that management's "control purpose" in completing the Signal and Western transactions (*i.e.,* preventing Klaus' control by diluting the voting strength of his stock) was a substantial purpose, but that its principal purpose was to attain legitimate business objectives. Therefore, the court found no violation of California law.

The court held that issuance of the stock option shares constituted a wrongful use, presumably under California law, by Hi-Shear's directors of their corporation position in order to further their personal interests. The court also found that the shares were issued in violation of its first Rule 62c Injunction.

The court held that management had intentionally misrepresented to its shareholders that it alone had acquired all of the shares purchased as a result of its 1973 tender offer. Such shares would be non-voting treasury shares under California law. The court found that Klaus could not reasonably have known that any of those shares could be voted for management, and that he relied on management's statements in determining the size of his second tender offer. Therefore, the court held that management was estopped from voting any of the 130,000 shares transferred by Hi-Shear to Caribe.

Jurisdiction

Klaus' amended complaint alleged that the agreements by which Hi-Shear retained voting rights in the stock issued to ESOT and to Signal constituted a solicitation of a proxy in violation of section 14(a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78n(a). He claimed that Hi-Shear had stated publicly that Klaus' second tender offer, if successful, would result in his obtaining control of Hi-Shear's management, but that management knew that issuance of new stock to ESOT, Signal, and Western would so dilute the voting strength of his shares as to prevent his obtaining control even if his tender offer was completely successful. Those public statements thus were asserted to be false and misleading within the intent of section 14(e) of the Act, 15 U. S. C. § 78n(e). Klaus alleged finally that these same transactions constituted a breach of management's fiduciary duty to its stockholders, in violation of California corporation law as well as of the evolving fiduciary standards imposed by sections 10(b) and 14(e) of the Act, 15 U. S. C. §§ 78j(b), 78n(e), and by rule 10b-5, 17 C. F. R. § 240.10b-5.

The court had jurisdiction over the federal claims under 28 U. S. C. § 1331. The state and federal claims "derive from a common nucleus of operative fact." *United Mine Workers* v. *Gibbs,* 383 U. S. 715, 725 (1966). The court therefore also had pendent jurisdiction over the state claims. The federal issues presented were substantial and not frivolous: the district court will retain power to adjudicate the state claims even if it should ultimately dismiss all the federal claims. *Id.* We have jurisdiction on appeal under 28 U. S. C. § 1292(a)(1).

Review of Preliminary Injunctions

Whether a preliminary injunction should be granted or denied lies within the sound discretion of the district court. We will ordinarily reverse an order granting or denying a preliminary injunction only for an abuse of that discretion. *Robinswood Community Club* v. *Volpe,* 506 F. 2d 1366, 1368

(9th Cir. 1974); *County of Santa Barbara* v. *Hickel,* 426 F. 2d 164, 168 (9th Cir. 1970). The conclusions of law upon which the district court bases such an order are subject to review, however, and we will vacate an injunction based on an erroneous legal premise. *Douglas* v. *Beneficial Finance Co.,* 469 F. 2d 453, 454 (9th Cir. 1972).

Irreparable Harm

In issuing each of its injunctions, the court concluded that money damages would not afford Klaus adequate relief for the harm caused him by management's violation of the law. It found that a balancing of the equities in each instance indicated that management should not be permitted to vote the shares in question pending a final judgment. We find that the court applied an improper test for the availability of injunctive relief.

The Supreme Court has recently restricted the availability of injunctive relief to either of the parties contesting a takeover bid for an alleged violation of the federal securities laws. *Rondeau* v. *Mosinee Paper Corp.,*—U.S.—(1975). The Seventh Circuit had enjoined voting of shares purchased without the filing of the proper forms with the SEC in violation of section 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(d). The court had held that the plaintiff corporation was harmed by Rondeau's failure to disclose information about himself and his purpose in purchasing the corporation's stock, because the corporation's management was delayed in its efforts to respond to a possible takeover threat. The Supreme Court reversed, holding that a showing of irreparable harm remained essential for injunctive relief; furthermore, the harm must be threatened not to the immediate contestant in the takeover bid, but to those parties whom Congress intended the Act to protect—the investors to whom the tender offer was made. The Court found that any possible harm which Rondeau's violation of section 13(d) caused the investing public was either too remote to warrant injunctive relief or could be adequately redressed by money damages.

Illegal Proxies

In enacting section 14(a), Congress intended to guarantee the integrity of the processes of corporate democracy. Section 14(a) is intended to insure that a shareholder entitled to vote on corporate decisions knows how his vote will be cast before he grants his proxy to management or others. The harm to be averted is only indirectly that to the individual shareholder. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964). Although a demonstration that proxies were obtained by materially misleading solicitation establishes a violation of section 14(a), the relief available to a plaintiff who did not himself grant a proxy depends on equitable considerations based on "the best interests of the shareholders as a whole." *Mills*, 396 U.S. at 388.

Klaus did not himself grant a proxy. He is able to assert a section 14(a) violation only derivatively on behalf of Hi-Shear. "[N]othing in the statutory policy 'requires the court to unscramble a corporate transaction merely because a violation occurred.'" *Mills*, 396 U.S. at 386. Klaus has not demonstrated equitable reasons that would justify rescinding, in effect, the proxies which may or may not have been illegally solicited. The equities weigh especially strongly against Klaus where it is clear that the proxies were freely given with full awareness of the issues involved.

Misrepresentation

Section 14(e), like the section 13(d) at issue in *Rondeau*, was one of the 1968 Williams Act amendments to the Securities Exchange Act of 1934. In enacting the Williams Act, Congress reacted to the trend toward making takeover bids by cash tender offers rather than by solicitations of proxies. As the Court stated in *Rondeau*:

> The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party. . . . [T]he Act's drafts-

> men commented upon the 'extreme care' which was taken 'to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid.'

95 S. Ct. at 2075-76.

Although, as the district court found, Klaus was mislead to his detriment by Hi-Shear's misrepresentations, and so made a cash tender offer for fewer shares than he in fact needed for majority control, the Court decided in *Rondeau* that the Williams Act was designed to protect cash tender offerees, not offerors. The district court issued its ESOT injunction entirely on the basis of harm to Klaus. We see no possibility that Hi-Shear's misrepresentation resulted in any harm to the cash tender offerees, certainly none that could not be compensated by money damages. *See Rondeau*, 95 S. Ct. at 2076-77.

Klaus has not demonstrated the irreparable harm from violations of sections 14(a) and 14(e) necessary to entitle him, under the relevant Supreme Court decisions, to permanent injunctions against the voting of the ESOT, Signal, and Western shares. Because he has no possibility of success on these theories, a preliminary injunction may not be based on them. A likelihood of success exists, however, based on his theory that Hi-Shear has violated its fiduciary duties under California law.

Fiduciary Duties

At the outset, we decline on this appeal to consider Klaus' argument that federal fiduciary standards may be inferred from sections 14(e) and 10(b) and rule 10b-5. Whatever the merits of his arguments,[1] it was not presented to the district court. The court thus did not abuse its discretion in ignoring this ground for relief in refusing a preliminary injunction against voting of the Signal and West-

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[1] *See generally* Note, *The Controlling Influence Standard in Rule 10b-5 Corporate Mismanagement Cases*, 86 Harv. L. Rev. 1007 (1973).

ern shares. Moreover, the asserted federal fiduciary standards would more or less duplicate those which have more surely evolved in California law, and so Klaus is not prejudiced by our refusal to consider his argument on appeal.

We hold that the court's finding that the principal purpose of the issuance of stock to ESOT was to dilute Klaus' voting strength is not clearly erroneous. Viewing the record as a whole, management's conduct in issuing so much stock on so many pretexts in so short a period of time provides a reasonable basis for the court's finding, even in the face of evidence that management had been contemplating such an employee stock plan for over a year. Also, conflicting evidence was presented as to management's conduct in acquiring Signal and Western. The evidence supporting management demonstrated a continuing policy of acquiring such properties and indicated a certain amount of care in negotiating for them. The court's finding that Signal and Western were acquired principally for legitimate business purposes was not clearly erroneous.

The general rule in California is that, in the absence of fraud or breach of trust, a court will not entertain a challenge by minority stockholders of a "business judgment" by the corporation's directors. *Fairchild* v. *Bank of America,* 192 Cal. App. 2d 252, 256, 13 Cal. Rptr. 491, 493 (D. C. A. 1961). Klaus in effect, however, alleges a breach of trust. The California court has held that majority stockholders have a fiduciary responsibility to the interests of *both* the corporation and the minority stockholders. *Jones* v. *H. F. Ahmanson & Co.,* 1 Cal. 3d 93, 81 Cal. Rptr. 592, 460 P. 2d 464, 471 (1969):

> Majority shareholders may not use their power to control corporate activities to benefit themselves alone or in a manner detrimental to the minority. Any use to which they put the corporation or their power to control the corporation must benefit all shareholders proportionately and must not conflict with the proper conduct of the corporation's business.

In *Ahmanson,* the majority stockholders set up a holding company in a manner which made the minority shares unmarketable. *Ahmanson* thus defined the duties of majority shareholders as private individuals, not as directors of the corporation. In so doing, it acknowledged that controlling shareholders acting as individuals have the same fiduciary responsibilities as they do when acting as directors. Conversely, the language in *Ahmanson* applies equally to the board of directors through which the majority shareholders operate.

It is true that the majority in *Ahmanson* was openly seeking its own advantage, while Hi-Shear's management asserts that the voting advantage which accrued to it was only incidental to the advantage which accrued to the corporation from the establishment of ESOT. Hi-Shear thus argues that management's actions are insulated from scrutiny by the "business judgment" rule. But language in *Ahmanson* requires management to demonstrate more than that the corporation derived some advantage from its actions. The majority shareholders in *Ahmanson* exercised control over the corporation for their own advantage:

> without regard to the resulting detriment to the minority stockholders and in the absence of any compelling business purpose. . . . At the trial they may present evidence tending to show such good faith or compelling business purpose that would render their action fair under the circumstances.

460 P. 2d at 476. "Compelling business purpose" suggests a balancing of the good to the corporation against the disproportionate advantage to the majority shareholders and incumbent management.

The district court found that Hi-Shear's principal motive was self-serving rather than a business judgment, and thus lacking in good faith. Hi-Shear did not suggest any compelling reason why ESOT had to be established at a time so advantageous to those in control rather than a few months later when it would not have caused a severe injury

to Klaus, the principal minority shareholder. The court reasonably found that in these circumstances the purported business purpose of the issuance of shares to ESOT was not sufficiently compelling to outweigh the unfair advantage to management at Klaus' expense ("the control purpose"). On the other hand, the court found a sufficiently compelling business justification to render the purchase of Signal and Western Methods and the accompanying issue of Hi-Shear shares fair to the minority shareholders as well as to the corporation.

Unlike federal securities statutes, California fiduciary standards do not protect the corporation's right to informed proxy voting by its stockholders, or the shareholder's right to accept or reject tender offers intelligently. Rather, they protect the substantive rights of minority shareholders such as Klaus. The district court may well ultimately determine that Klaus is entitled to permanent injunction against the voting of the ESOT shares as the appropriate remedy for management's violation of its fiduciary duties toward Klaus. We would affirm a preliminary injunction against the transfer of those shares, if they had not already been transferred, because of Klaus' likelihood of success on the merits and the irreparable harm which would result if he were forced to "unscramble the egg" after the transaction was concluded.

Unfortunately, however, the egg has already been scrambled, and a delay in any possible disenfranchisement of the ESOT shares will not cause Klaus any irreparable harm. Putting Klaus in a position where he could oust management while the litigation is still pending would only further complicate this complex case. A preferable course is to stabilize all parties' positions as far as possible, preventing either management or Klaus from obtaining a new advantage over the other until the court can resolve all the legal issues. This is not the proper stage of the litigation to attempt to right past wrongs by enjoining the voting of stock already transferred. Therefore, we reverse the order of the district court and vacate the ESOT Injunction.

Caribe Injunction

Caribe was first named a defendant in Klaus' second amended complaint on December 20, 1974. Caribe did not receive notice of the January 13, 1975 hearing which led to the February 5 Caribe Injunction, however, and was not represented at the hearing. Midwood never was named as a defendant, and was not notified of or present at the February 12 hearing.

Fed. R. Civ. P. 19(a) requires that a person subject to process whose joinder will not deprive the court of jurisdiction must be joined as a party if he claims an interest in the subject of the action and if his absence might as a practical matter impair or impede his ability to protect that interest. By this standard, Caribe clearly was an indispensable party to the February 5 injunction, as was Midwood to the February 12 order. Under California law, the right to vote a share of stock is a property right. *Meyberg* v. *Superior Court,* 19 Cal. 2d 336, 341, 121 P. 2d 685 (1942). The order enjoining Hi-Shear from counting the votes of the Caribe stock deprived its owner of that property right. Caribe is a California corporation. Midwood is a New York corporation presumably subject to process under California's long-arm statute. The joinder of both corporations therefore was feasible under rule 19(a). "When necessary, . . . a court of appeals should, on its own initiative, take steps to protect the absent party, who of course had no opportunity to plead and prove his interest below." *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U. S. 102, 111 (1968). The Caribe Injunction and the Midwood Order are vacated because of the district court's failure to join indispensable parties; also because of Klaus' failure to give notice to Caribe and Midwood as required by Fed. R. Civ. P. 65(a)(1). "The notice required by Rule 65(a) before a preliminary injunction can issue implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition." *Granny Goose Foods, Inc.* v. *Teamsters Local No. 70,* 415 U. S. 423,

434 n. 7 (1974). Neither party was represented at the December hearings.

Stock Option Injunction

The district court found that Hi-Shear had issued stock pursuant to its 1972 stock option plan in violation of the (first) Rule 62c Injunction. We disagree. The court on January 14, 1975, ordered:

> Pending such annual meeting and consequent election of a new board of directors, the defendant shall not cause to be issued any shares of its stock without prior order of this court or of the Court of Appeals.

The stock issue which the court claims was in violation of this injunction was transferred to Hi-Shear employees upon exercise of their stock options and execution of promissory notes to Hi-Shear, prior to January 14. Only the formal issuance of the stock certificates occurred after that date. In California, a stock certificate is evidence of ownership, but its possession is not an essential ingredient of ownership. *Mindenberg* v. *Carmel Film Productions, Inc.*, 132 Cal. App. 2d 598, 282 P. 2d 1024, 1031 (1955); *Mitchell* v. *Beckman*, 64 Cal. 117, 28 P. 110, 111 (1883). The employees became owners before January 14. They were entitled to demand issuance of the certificates evidencing that ownership, and Hi-Shear did not violate the injunction by issuing them.

The court also based its injunction on the alternative ground that the issuance of 71,000 shares under the 1972 option plan constituted a wrongful use of corporate positions by members of management to further their own ends. Wing and Luth challenge the injunction, claiming a number of procedural errors which deprived them of due process rights. We do not reach these objections . The preliminary injunction, if based on findings of violations of California fiduciary standards, cannot be justified by any anticipated

irreparable harm to Klaus. Our conclusion is based on the same analysis as presented in our discussion of the ESOT Injunction.

The order enjoining the voting of 71,000 shares of stock held by Wing and Luth is reversed.

Rule 62 Injunctions

Hi-Shear's appeals from the two rule 62c injunctions are dismissed as moot. The purpose of an injunction issued pursuant to Fed. R. Civ. P. 62c is preservation of the status quo until the court of appeals has acted on an appeal from an order granting or denying an injunction. The rule 62c injunctions thus have terminated automatically with our disposition of the other appeals. Objections to the validity of a rule 62c order could be made only by motion, pending action on the principal appeals.

Conclusions

For the reasons stated, the appeals from the two rule 62c injunctions are dismissed as moot. All other orders granting injunctions are vacated, and all orders denying injunctions are affirmed. The case is remanded to the district court for further proceedings and disposition on the merits. The court is of course free to enter any interlocutory orders it deems desirable, compatible with the guidelines set forth herein.

Affirmed in part, Vacated in part, and Remanded; Each party to bear his costs.

Supreme Court, U. S.
FILED
MAR 3 1976

No. 75-354

IN THE

Supreme Court of the United States

October Term, 1975

THE FIRST BOSTON CORPORATION,

Petitioner,

v.

CHRIS-CRAFT INDUSTRIES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FIRST BOSTON'S REPLY TO THE GOVERNMENT'S BRIEF

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The Government acknowledges that the liability issues presented by this case are federal questions of "substantial importance" (Brief 17, 20), that the damage issue is also "important" because "use of an incorrect measure could distort the allocation of risks in contests for control" (Brief 24) and that the damages awarded below were excessive by $15,000,000 (Brief 23, n. 14). The Government even in effect fully concedes that one issue—the scope of First Boston's liability as an underwriter—merits certiorari (Brief 20-21 & n. 12).

But having thus made out a case for review, the Government's brief shifts to partisan argument on the merits, to favor the open-ended application of the securities laws that was rejected by the Court in *Blue Chip Stamps*, therefore concluding that review on certiorari is "unwarranted"—meaning that review is "unwanted" by the SEC.

Seeking to preserve the decision below at all costs for its *in terrorem* enforcement effect, the Government:

> (1) Accords the narrowest possible construction to the Court's opinion in *Blue Chip Stamps* and refuses to recognize a conflict between the Second and Ninth circuits that has arisen since our petition;
>
> (2) Ignores the fundamental question raised by an award of $36,000,000 based on a conclusive presumption of causation;
>
> (3) Assumes that an underwriter's failure to discharge the duty of due diligence under the 1933 Act is the equivalent of *scienter* under the 1934 Act; and
>
> (4) Dismisses as a pointless exercise Congress' deliberate and "most important" amendment of the 1933 Act to set an absolute maximum limit on an underwriter's liability.

The errors and omissions in the Government's presentation serve to underscore the conclusion that plenary review of the issues of federal law presented by this case, and recognized by the Government to be of "substantial importance," is warranted. *See* Sup. Ct. R. 19.

I.

"Standing." The Court in *Blue Chip Stamps* strongly cautioned against expansive judicial creation of implied actions under the securities laws, particularly when follow-

ing such a course would go beyond the bounds established by Congress for comparable express actions.

The Government argues (Brief 13-16) that the teaching of *Blue Chip Stamps* is inapplicable here because Section 14(e), unlike Section 10(b), is not expressly limited to "the purchase or sale" of securities, but speaks of "solicitation of security holders in opposition to or in favor of any [tender] offer." From the words "solicitation . . . in opposition," and nothing more, the Government concludes (Brief 14-15) that "by its express terms" the protection of Section 14(e) extends beyond the shareholders to whom such solicitations are addressed to include tender offerors themselves.

It is not a "buyer or seller" requirement that precludes standing here. The point is that the statutory language "in opposition" is clearly and *expressly* directed only at protecting public "security holders" from being misled into rejecting an advantageous offer. And the legislative history of the Williams Act shows that Congress was concerned with "protection of investors" and affording "shareholders a fair opportunity to make their decision" —not with creating a new federal law of "unfair competition" involving a whole panoply of rights and duties of contestants for control *inter sese*.

This was explicitly recognized by the Ninth Circuit's recent decision in *Klaus* v. *Hi-Shear Corp.*, CCH FED. SEC. L. REP. ¶ 95,404, at 99,068 (Dec. 15, 1975), which, though dismissed by the Government in a footnote (Brief 18, n. 9), directly conflicts with the decision below. Citing this Court's *Rondeau* decision, the Ninth Circuit squarely held that a contestant for control was not within the class pro-

tected by Section 14(e), since "the Williams Act was designed to protect cash tender offerees, not offerors."[1]

Causation. The Government fails entirely to justify the Court of Appeals' conclusive presumption that the omission of the BAR offer from the Bangor Punta registration statement *caused* Bangor Punta's exchange offer to succeed and the court's further conclusive presumption that the success of that particular offer *caused* Chris-Craft to lose the contest for control by providing a margin of victory that would not otherwise have been achieved.

The facts were directly contrary to the presumptions. The undisputed evidence showed that the sale of the BAR enhanced the value of Bangor Punta's securities (Pet. 4, n. 3), and there was no evidence that any shareholder would have tendered to Chris-Craft rather than Bangor Punta had he known of the BAR offer (A145). Further, Bangor Punta acquired the remaining shares it needed for control by cash purchases and could have acquired more by the same means (A18). In the face of these record facts, the award of massive damages by presumptions as to causation may fairly be characterized as a denial of due process.

Scienter. While properly supporting certiorari on the scope of First Boston's liability as an underwriter, the

[1] *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579 (5th Cir. 1974), represented by the Government to be in accord with the decision below (Brief 17-18), dealt with the right to sue of a nontendering shareholder, not a contestant for control, and cited the decision below only perfunctorily in a footnote discussing general concepts. *H. K. Porter Co.* v. *Nicholson File Co.*, 482 F.2d 421, 424-25 (1st Cir. 1973), granted a tender offeror a right of action, but expressly cautioned that "the overriding purpose of § 14(e) is the protection of the investor" and that it "may not be diverted from one designed to assist the investor to one operated principally to benefit one or another of the rival management or control groups jockeying for power."

Government begs the question on the merits of the issue by merely repeating the Court of Appeals' conclusory statements as to *scienter*. In point of fact, each judge on the panel below expressly upheld the District Court's finding of "good faith": Judge Timbers in the majority opinion on liability (A47), Judge Gurfein in the majority opinion on injunctive relief (A97-98) and Judge Mansfield in his concurring opinion (A118-119).[2]

All the Court of Appeals' rhetoric about First Boston's "abdication" of responsibility is premised on its "duty of due diligence" as an underwriter pursuant to Section 11 of the 1933 Act. An "unintentional" error made in "good faith" is transformed into *scienter* for 1934 Act purposes only because of the underwriter's special duty under Section 11. But that duty *extends only to purchasers of registered securities.* Equating its breach with a violation of the 1934 Act in order to extend its liability to others makes a mockery of both Section 11's express limitations on liability and the 1934 Act's *scienter* requirement.

In sum, there are substantial reasons for questioning the "manifest correctness" of affording a contestant for control an implied action for damages under Section 14(e): as this case shows, such actions place honest businessmen in peril of massive damages on the basis of a court's after-the-fact disagreement with their good-faith assessment of proper disclosure and inherently create the opportunity for speculative recoveries of the sort condemned by the Court in *Blue Chip Stamps.* Witness just

[2] Resolution of *Ernst & Ernst* v. *Hochfelder*, No. 74-1042, to require "bad faith" for "scienter" would certainly preclude liability here.

the fact that the District Court, the Court of Appeals and the Government's brief have come up with three different measures of damages.

II.

Damage Limitation. The Government incredibly suggests that the damage limitation provision of Section 11 "simply recognizes that the loss suffered by a defrauded purchaser will not exceed the price he paid for the securities." (Brief 19). What Congress sought to do in the "most important" amendment to the 1933 Act was not merely to recognize inescapable fact.

Under the Act in its original form any one member of an underwriting syndicate could have been held liable for the full amount of an issue of securities. Recognizing the danger of so extreme an exposure to the investment banking industry, Congress in 1934 amended the Act to provide that "in no event" shall an underwriter be held liable for damages in excess of the offering price of the securities underwritten by him. In other words, the exposure of any underwriter is limited to his participation, even though others liable may have become insolvent and some purchasers are thereby left without any recourse.

Even if the issues of standing, causation and *scienter* were resolved in favor of Chris-Craft, the care taken by Congress to limit the amount of an underwriter's liability —in the only instance in which it directed its attention to that question—should absolutely preclude the imposition of greater damages in a judicially implied action under another statutory provision.

In rejecting Congress' express limitation intended to preserve and protect the public interest in the capital formation process, the decision below has raised a question of the first importance, which surely merits this Court's review. The Government's now taking a position in opposition to such review defies understanding in view of the position it took in the Court of Appeals in support of First Boston's petition for a rehearing.[3]

Measure of Damages. The Government acknowledges the importance of the issue as to measure of damages (Brief 24) and concedes both that the Court of Appeals' basic damage formula was in error (Brief 21-23) and that, *in addition,* the award was excessive by the amount of $15 per share, or a total including interest of $15,000,000, because that amount represented a market decline (Brief 23, n. 14).

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[3] In the Court of Appeals the SEC supported the petition on both the issue of the limitation on First Boston's liability and the propriety of holding First Boston jointly and severally liable with the other defendants, who were held to have committed additional and separate violations of the 1934 Act. A comparison of its two briefs is dramatic:

Before the Court of Appeals	*Before this Court*
"As suggested by First Boston's petition and by the brief in support of rehearing tendered by the Securities Industry Association, answers to these questions may have a wide-ranging impact upon the investment banking industry, upon the nation's economy and upon the enforcement of the federal securities laws by the Commission as well as by private parties * * * the Commission believes it is in the public interest for rehearing to be granted * * *"	"* * * the questions presented do not warrant review by this Court."

The Government's strong approval of damage awards of this dimension leads it, however, to attempt to buttress the decision below by presenting a hypothetical reformulation (nowhere supported in the record) which it claims produces "almost identical damages" (Brief 23-24). Oddly, the Government's own reformulation adopts the erroneous $27 residual value figure which produces damages that include $15,000,000 for market loss!

In dismissing the award of $15,000,000 in damages for a market decline as not of "sufficient general importance to warrant review by this Court" (Brief 23), the Government ignores the fact that such an award is not ordinary judicial error. Congress has prohibited damage awards of that nature in Section 28 of the 1934 Act, as well as in Section 11 of the 1933 Act. A clearer ground for exercise of this Court's supervisory power is hard to imagine.

Conclusion

The decision below accords Section 14(e) of the 1934 Act the most expansive scope conceivable and, as the Government acknowledges, raises several issues of the first importance to application of the federal securities laws as a coherent whole. This case presents a singularly appropriate occasion for review of these issues, and the SEC's endorsement of the new implied liability created below is not a ground for refusing review.

For the reasons stated herein and in our earlier submissions, a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit.

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IN THE

Supreme Court of the United States

October Term, 1975

Nos. 75-353, 75-354 and 75-355

HOWARD PIPER, *et al.*,
Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,
Respondent.

THE FIRST BOSTON CORPORATION,
Petitioner,

v.

CHRIS-CRAFT INDUSTRIES, INC.,
Respondent.

BANGOR PUNTA CORPORATION, *et al.*,
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v.

CHRIS-CRAFT INDUSTRIES, INC.,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONSE OF RESPONDENT CHRIS-CRAFT INDUSTRIES, INC. TO PETITIONERS' REPLIES TO THE SOLICITOR GENERAL'S BRIEF

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RESPONSE OF RESPONDENT CHRIS-CRAFT INDUSTRIES, INC. TO PETITIONERS' REPLIES TO THE SOLICITOR GENERAL'S BRIEF

The Solicitor General, concluding that this case was correctly decided and that there are no conflicts among the Circuits, has recommended a denial of the petitions for certiorari. His views are fully supported by the record and traditional principles of law.

The Second Circuit has decided this case in Chris-Craft's favor on three separate occasions over a span of seven years. This Court denied certiorari in 1973 (414 U.S. 910). And the *Chris-Craft* opinions have already been followed in at least 50 reported cases across the nation precisely because they reflect sound and traditional legal principles.

Petitioners now accuse the Solicitor General of personal bias—namely, of distorting the issues and taking a "partisan" and "cavalier" view in order to "preserve the decision below at all costs."* Such intemperate personal attacks, wholly improper, are apparently made out of desperation because petitioners cannot raise any genuine issues worthy of certiorari. The fact is that the Solicitor General, as an independent officer of ·· Court, gave fair, impartial and careful attention to this complex factual case over a period of four months in response to this Court's directive.**

* First Boston Br. at 1-2; Bangor Br. at 6; Pipers' Br. at 2.

** The Solicitor General and his staff first received separate submissions from the SEC and the Treasury Department and then held a series of meetings with counsel for the various parties. This intensive review process, which involved a study of many hundreds of pages of opinions and briefs in this case, as well as independent research, consumed the period from November 1975 to the end of February 1976.

Petitioners also distort the Solicitor General's views by stringing together quotations ripped out of context from different sections of his brief. For example, petitioners claim that the Solicitor General suggested that several issues were worthy of certiorari, whereas in fact he flatly and squarely recommended against certiorari. Similarly, petitioners claim that the Solicitor General found that the damage award was excessive by $15 million, whereas in fact he proposed an alternative formula that yielded virtually identical damages and concluded that the damage issue was not worthy of certiorari (S.G. Br. at 24).

Liability Issues

This Court previously denied certiorari on all of the liability issues. The Second Circuit labeled petitioners' liability arguments as "frivolous" (B 40, n. 30). And now the Solicitor General has independently reached the same conclusion.

Concluding that the case was correctly decided, the Solicitor General notes that most of petitioners' liability claims "turn largely upon the particular factual circumstances of this case and the application of well established principles of securities and tort law" (S.G. Br. at 2).* But this Court does not grant certiorari "to review evidence and discuss specific facts." *United States* v. *Johnston,* 268 U.S. 220, 227 (1925) (Holmes, J.); *Southern Power Co.* v. *North Carolina Public Service Co.,* 263 U.S. 508 (1924).

* As shown in our brief in opposition (at 22-27), proof of *scienter* was overwhelming here and causation was a matter of mathematical certainty. A stronger case on these fact issues is difficult to imagine.

On the standing issue, the Solicitor General concludes that Chris-Craft clearly had the right to sue under Section 14(e) of the Williams Act based on the statute's language and legislative history, all the relevant authorities, and the public policy favoring private enforcement of the securities laws stressed by this Court in *J. I. Case* v. *Borak,* 377 U.S. 426 (1964). Contesting the Solicitor General, petitioners cite *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723 (1975), and a recent Ninth Circuit decision, *Klaus* v. *Hi-Shear Corp.,* [Current] CCH Fed. Sec. L. Rep. ¶95,404 (9th Cir. 1975).

The Solicitor General properly pointed out that *Blue Chip* (S.G. Br. at 16-17) was wholly consistent with Chris-Craft's standing here. Section 14(e) does not contain the buyer-seller requirement involved in *Blue Chip;* and this case, unlike *Blue Chip,* is certainly not a "vexatious" litigation. Far from it, this case involves massive injury by admitted violations against Chris-Craft's $60 million investment.

The *Klaus* opinion is correctly distinguished by the Solicitor General (S.G. Br. at 18, n. 9), who notes that the court there merely denied a preliminary injunction because of lack of irreparable injury; and that the court there did not even refer to the instant case. Moreover, *Klaus* did not involve the issue of standing. On the contrary, the defendant target-company there conceded that the offeror had standing and a right to seek damages.*

* Hi-Shear—the target company—did not dispute that if it had made misleading statements to its shareholders to discourage their acceptance of the tender offer, Klaus, the tendoror, would have had the right to relief under Section 14(e) (Brief of Hi-Shear Corp., Dkt. No. 75-1444 at 46). But it contended that its actions were not improper and that, in any event, because Klaus had an action under Section 14(e) for money damages, no irreparable injury existed (Brief of Hi-Shear Corp., Dkt. No. 75-2380 at 49).

Klaus, moreover, indicates that it rests on the Ninth Circuit's interpretation of this Court's recent opinion in *Rondeau* v. *Mosinee Paper Corp.,* 422 U.S. 49 (1975). That opinion, like the Solicitor General's brief, recognizes that the Williams Act was intended to "avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid" (422 U.S. at 58-59). Moreover, *Rondeau* stresses, as does the Solicitor General, that this Court has not hesitated "to fashion private remedies for securities laws violations when to do so is consistent with the protection of investors as a supplement to enforcement by the Securities and Exchange Commission," citing *Borak* (422 U.S. at 62). The landmark *Borak* decision found an implied cause of action for opponents of management under Section 14(a) in proxy contests. Four years after *Borak,* Congress passed Section 14(e) to bring tender offers under the same standards of fair play as proxy contests. It would make no sense to recognize standing if a party proceeded by a proxy fight but not if he proceeded by a tender offer.

The Solicitor General's views on standing are clearly correct, as shown by the foregoing cases and by the long line of authorities cited in our brief in opposition (at 19-20) recognizing that all parties in a control contest may sue to prevent fraudulent or deceptive acts.* As Judge Friendly stated in *Electronic Specialty Co.* v. *International Controls Corp.,* 409 F.2d 937, 940 (2d Cir. 1969), cited by the Solicitor General (Br. at 14), Section 14(e) in effect "applies Rule 10b-5 both to the offeror and to the opposition." In-

* First Boston (Br. at 4) seeks to belittle *Smallwood* v. *Pearl Brewing Co.,* 489 F.2d 579 (5th Cir. 1974), and *H.K. Porter Co., Inc.* v. *Nicholson File Co.,* 482 F.2d 421 (1st Cir. 1973). But both cases specifically cited and followed the rationale of *Chris-Craft* on standing.

deed, Section 14(e) was adopted to dispel any questions about standing. Thus, this Court denied certiorari in *Crane Company* v. *Westinghouse Air Brake Company,* 419 F.2d 787 (2d Cir.), *cert. denied* 400 U.S. 822 (1970), where judgment was rendered in favor of a tender offeror. There, the Second Circuit stated that the adoption of Section 14(e) "should serve to resolve any doubt about standing in tender offer cases" (419 F.2d at 799). Indeed, it has had that effect since recent cases under Section 14(e) no longer even bother to raise the issue of standing.* Thus, as the Solicitor General notes (S.G. Br. at 18), "there may be less reason to review this issue now than when this Court previously denied certiorari."

The Solicitor General's conclusion (S.G. Br. at 15) that a private right of action for all parties in control contests is a vital alternative to increased government intervention makes particularly relevant today the observation of Roscoe Pound:

> "From the beginning, the main reliance of our common-law system has been individual initiative. The main security for peace at common law is private prosecution of offenders . . . [T]he individual is supposed at common law to be able to look out for himself and to need no administrative protection." Roscoe Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice,* 8 Baylor L. Rev. 1, 13 (1956).

* *E.g., Alaska Interstate Co.* v. *McMillan,* [Current] CCH Fed. Sec. L.Rep. ¶95,276 (D. Del. 1975); *Commonwealth Oil Refining Co.* v. *Tesoro Petroleum Corp.,* 394 F.Supp. 267 (S.D.N.Y. 1975); *Copperweld* v. *Imetal,* 403 F.Supp. 579 (W.D. Pa. 1975); *Emhart Corp.* v. *USM Corp.,* 403 F.Supp. 660 (D. Mass. 1975); *Mesa Petroleum Co.* v. *Aztec Oil and Gas Co.,* [Current] CCH Fed. Sec. L.Rep. ¶95,424 (N.D. Tex. 1976).

Section 11

First Boston, in its principal attack on the Solicitor General, continues the charade that it was merely found guilty of breaching its duty of due diligence under Section 11 of the 1933 Act and thus cannot be liable to Chris-Craft for compensatory damages under Section 14(e) of the 1934 Act. But the Solicitor General points out (S.G. Br. at 20) that the Second Circuit found that First Boston's conduct went "far beyond mere negligence." It had *actual knowledge* of the overvaluation of BAR because it had read Bangor's minutes that the railroad, listed in the prospectus as being worth $18 million, was for sale to the only willing buyer at $5 million (A 51-55). Accordingly, the Solicitor General correctly concludes (S.G. Br. at 20) that "[s]ince the court of appeals imposed a requirement of *scienter* in finding a violation of Section 14(e), it would have been inappropriate to limit liability to that which could arise from mere negligence under Section 11."

That conclusion is indisputably correct, as shown by First Boston's own concession in its trial memorandum, cited in our brief in opposition (at 33), and by the unbroken chain of authorities over the past quarter of a century following Judge Frank's landmark opinion in *Fischman* v. *Raytheon Manufacturing Co.,* 188 F.2d 783 (2d Cir. 1951). Those authorities are also cited in our brief in opposition (at 32-33).

First Boston's Section 11 claim as to a limitation on the amount of its damage exposure is surely blown out of all proportions today because First Boston has agreed with Bangor, according to their public announcements, to share

the judgment equally if certiorari is denied and to pursue contribution claims against the Pipers. By virtue of this sharing agreement, First Boston has significantly reduced its exposure: it would now bear little more burden under this agreement than under its unprecedented interpretation of Section 11.*

Damages

The Second Circuit calculated damages at $37 per share (B 31). The Solicitor General, using an alternative approach, calculates damages at $37.50 per share (S.G. Br. at 24). Both figures are virtually identical.

The Second Circuit, although agreeing with the Solicitor General that his "expectancy" formula of damages would have been fairer to Chris-Craft (B 21), used a more conservative standard because it wished to bring an end to this protracted litigation (B 24-25). It thus emphasized that its award, based on Chris-Craft's actual cost without an expectancy premium, was "the minimum amount of damages that the district court could have awarded without committing reversible error" (B 25). The Solicitor General, recognizing that his approach and the Second Circuit's formulation

* While concluding that the Second Circuit correctly held First Boston liable for compensatory damages despite Section 11's special limitation on damages and recommending against a review of the Section 11 issue by this Court, the Solicitor General notes (S.G. Br. at 21, n. 12) that the court might nevertheless wish to remand to the Second Circuit for "explicit consideration" of this issue. But First Boston does not endorse that suggestion, which would prolong this 7-year-old litigation for no valid reason. Moreover, First Boston squarely raised the Section 11 issue before the Second Circuit in its petition for rehearing in *Chris-Craft III*. The court denied that petition—a sound result because it had rejected First Boston's claim of lack of *scienter* as "frivolous" (B 40, n. 30).

produced "roughly comparable" results (Br. at 23), concludes that the measure of damages does not warrant a grant of certiorari (Br. at 24).

Petitioners, attacking the Solicitor General, complain that there was a $15,000,000 overassessment of damages because he used the wrong numbers in doing the arithmetic under his expectancy formula. That claim is without merit. For the fact is that the Second Circuit itself, in order to verify its conservative damage calculation, also used the type of expectancy formula recommended by the Solicitor General; and, in doing so, the court filled in the formula with the numbers provided from the mouth of defendants' star expert witness (B 31-32, n. 24). Using that alternative mathematical exercise, the Second Circuit came up with virtually identical damages to those computed in the body of its opinion and by the Solicitor General in his brief.

Thus, petitioners' rhetoric about damages is a tempest in a teapot. The Second Circuit tailored the damages to the unique facts of this case, giving defendants the benefit of all doubts to conclude this over-aged litigation. This Court does not sit to allow litigants "a second appeal" (*Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 453 (1959), or to perform academic exercises in calculus.*

* Petitioners stress a footnote in the Solicitor General's brief (at 23, n. 14) which questions the $27 per share value used by the Court of Appeals on the theory that this compensates Chris-Craft for a decline in the market between September 5, 1969 (the date Bangor obtained control) and January 1970. But the court's use of January 1970—the first date on which the stock could have been sold via a registered public offering—was clearly correct. The well-settled rule is that an interest which is not readily marketable is valued at the date of the first reasonable sale. *United States* v. *Swift & Co.*, 270 U.S. 124, 149 (1925).

(footnote continued on next page)

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. [Citations omitted] 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

Finally, even if there were any factual questions as to the precise calculation of damages, "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946).

Conclusion

The Solicitor General, contrary to petitioners' claims of bias, acted independently and fairly in this matter and conducted an exhaustive review of this complex factual case, with other interested agencies of the government—a

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In any event, as the Court of Appeals noted (B 31-32, n. 24), defendants' own star expert admitted that Chris-Craft's large block could not have been sold for more than $32 per share on September 5—and at that price *only* if a buyer could be found. There was no buyer for Chris-Craft's large minority block. The figure of $48 per share mentioned in the footnote was the District Judge's hypothetical value on September 5 for a 100-share block, not Chris-Craft's 700,000 share block; and the $41-$43 figure cited in the footnote was defendants' experts' estimate for a hypothetical but impossible September 5 public offering from which he testified a 25% to 35% discount had to be taken for a private sale if a buyer could have been found (B 31-32, n. 24). The date and price of a first sale in this complex securities case are the type of factual issues which are not properly the subject of certiorari. Accordingly, the Solicitor General himself in the footnote in question concludes that this issue "does not appear to be of sufficient general importance to warrant review by this Court."

review that required four months of study of the voluminous record of this 7-year-old litigation. The Solicitor General's independent conclusions that the case was correctly decided and that the quantum of damages was appropriate are fully supported by the record and by well-worn and traditional principles of law.

Chris-Craft lost the control contest, and suffered massive damages, because it obeyed the law. Bangor won the contest because it broke the law. There is no genuine dispute about that. Nevertheless, this case has now dragged on for seven years. It has been before the Second Circuit on three occasions, once *en banc*, and there were three requests for rehearing. The case now has been before this Court on two occasions and 18 separate briefs have been filed in this Court. We submit that it is time to bring this litigation to an end, particularly now in view of the Solicitor General's independent and reasoned conclusion that certiorari is not justified.

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FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-353

HOWARD PIPER, THOMAS F. PIPER and WILLIAM T. PIPER, JR.,

Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CONSOLIDATED WITH NOS. 75-354 AND 75-355

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

When one peels aside the rhetoric in Chris-Craft's brief, its concessions with respect to the Piper individuals stand exposed at long last. Chris-Craft simply never proved that the Piper individuals caused the "injury" for which it has been awarded damages of $36 million.

Chris-Craft now claims that had Bangor Punta not purchased 120,200 shares for cash in May or had 110,000 shares tendered in July, it would have had a "formidable lead" of "at least 41% to 31%" in the contest for control of Piper Aircraft—"could not have been overtaken" and,

indeed, had a 99-1 chance of prevailing (Chris-Craft Br., pp. 4, 23, 79-82). Since those acquisitions occurred months after the only alleged violations of Section 14(e) for which the Piper individuals had been held liable, it is no longer open to dispute that the January events did not cause Chris-Craft any injury. For this reason alone the decisions of the Court of Appeals must be reversed.

In order to overcome this fatal flaw, Chris-Craft's brief mischaracterizes the record, repeatedly refers collectively to petitioners as though this were a conspiracy case, and refers to irrelevant matters which did not cause—and which no court has ever held caused—any harm to Chris-Craft. We are, therefore, constrained to submit this reply brief.

The brief served by the Securities and Exchange Commission ("SEC") as *amicus curiae,* on the other hand, deserves little comment on behalf of the Piper individuals. That brief never mentions the January communications. That brief never once suggests that the Piper individuals' actions in January 1969 violated Section 14(e). Indeed, that brief pointedly refuses to comment on whether there were any violations, whether the violations claimed caused the injury complained of, whether any injury has even been shown, whether liability, if any, should be apportioned among the defendants or whether the computation of damages by the Court of Appeals was correct. Nor does the brief attempt to support the "fanciful assumption" amounting to "rank speculation" (A-115) which is the sole basis for holding the Piper individuals jointly and severally liable with Bangor Punta and First Boston.* The SEC brief is primarily concerned with the standing

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* The brief properly concedes that "if the defendants can demonstrate that all or part of the plaintiff's damages were the result of factors other than the defendant's wrongdoing, the award of damages should be diminished accordingly" (SEC Br., p. 161, n. 370).

issue. Since the other parties in this consolidated proceeding are separately replying to the SEC brief, we will not burden the Court with additional comments.*

Some Comments With Respect to Chris-Craft's Mischaracterizations and Irrelevancies

1. The so-called "summit conference" at the Yale Club in April 1969 (Chris-Craft Br., pp. 9, 11-12) was the first meeting between representatives of Bangor Punta and the Piper individuals. No agreements were reached there. Nothing transpiring at that meeting or resulting from it was unlawful and no court has ever faulted the Piper individuals for participating in the meeting.

If Bangor Punta's subsequent cash purchases in May were in technical violation of Rule 10b-6, the Piper individuals were unaware of them and did not participate in them. They were never charged by Chris-Craft with any liability for them and were never held by any court to be responsible for them.

2. Bangor Punta's inadvertence in failing to describe its consideration of disposing of the Bangor and Aroostook Railroad was not and could not be attributed to the Piper individuals. Chris-Craft itself stipulated in the trial court

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* We must point out, however, the SEC's apparent lack of familiarity with the record in this case. During its discussion of the interrelationship of the Securities Act of 1933 and the Securities Exchange Act of 1934, it poses a theory if "the Pipers made knowing misstatements in connection with sales of securities" (p. 154) and if "the Pipers made false and misleading statements in connection with the sale of Bangor Punta or Piper securities" (p. 155). Since the liability of the Piper individuals is not premised on the sale of Bangor Punta securities but rather the absence of tenders of Piper Aircraft securities to Chris-Craft in January 1969, these references to the "Pipers" are inappropriate and unwarranted.

that the Piper individuals were unaware of the consideration being given by Bangor Punta to the railroad until reading reports appearing in the press after the sale (R460A). Chris-Craft's repeated reference to "petitioners" when discussing the railroad would appear a deliberate attempt to obscure that fact.

3. Chris-Craft's repeated reference to the self-described undisclosed $13 million "bonus" (Chris-Craft Br., pp. 10-11; 22, 64) is plainly wrong. The possibility that the 43 members of the Piper family might receive the same consideration as all other Piper Aircraft shareholders if Bangor Punta acquired more than 50% of the Piper Aircraft shares was not concealed. Chris-Craft itself stipulated in the trial court that the arrangement was described in Bangor Punta's preliminary and final prospectuses in May and July, respectively (R426A, R428A-430A). The Court of Appeals acknowledged that the provisions were fully described in the prospectuses (A-40, n. 17).* The alleged Section 14(e) violation was that the information was not reiterated in each letter to shareholders (A-41). Chris-Craft, however, specifically called the information to the attention of shareholders in its own letter to them (R424A). Indeed, Piper Aircraft's management's letter of June 4, 1969—the first of the three letters to shareholders concerning Bangor Punta's exchange offer—specifically admonished the Piper Aircraft shareholders: "In your own interests we urge you to read and study this material carefully" (R413A). There is no reason to believe shareholders did not follow that advice. Hence, the Court of Appeals could not say that Chris-Craft was injured (A-63).

Most importantly, however, there simply was no "bonus." The 43 members of the Piper family were only to be

* Indeed, Chris-Craft's own prospectus on its exchange offer fully described the arrangement also. See R430A.

treated the same as all other shareholders of Piper Aircraft.

Under the May 8 agreement between Bangor Punta and the 43 members of the Piper family, Bangor Punta agreed to exchange a specified package of Bangor Punta securities —valued at less than $80 (A-14)—for the 501,090 Piper Aircraft shares owned by the Piper family.* All other shareholders of Piper Aircraft were to be offered a package of Bangor Punta securities or cash having a value of at least $80 per share (*ibid.*). As Chief Judge Lumbard observed, the May 8 agreement contained a provision "to safeguard the Pipers in that they would receive consideration worth at least $80. Thus, as they well may have had a right to expect, the other shareholders of Piper were assured substantially equal treatment to that received by the Piper family" (C-23).

4. Chris-Craft's repeated reference to its own creation, a so-called "scorched earth" policy (Chris-Craft Br., pp. 5-6, 23, 75, 78, 107), illustrates the dearth of support for its claim. There was no such policy. No court ever referred to, or even suggested that, it existed. The plain fact is that Chris-Craft is attempting to penalize the Piper individuals because they and other members of management had the effrontery to refuse employment contracts offered to them by Chris-Craft (R2060A-2061A) and opposed Chris-Craft's takeover attempt instead. Management believed that a Chris-Craft takeover would harm Piper Aircraft because of Chris-Craft's "track record" and the character of its management (R2051A-2052A)—a belief no court has questioned and one found to be fully supported by the record (A-136, B-61-B-62).

* The Piper individuals and their wives owned only about 150,000 of the 501,090 shares. The remainder were owned by corporations, trusts and individuals related to William T. Piper, Sr., the now deceased founder of Piper Aircraft.

5. Despite Chris-Craft's arguments, certain points made in petitioners' Main Brief are undenied and undeniable.

a. The Piper Aircraft shareholders, the class for whose benefit the William's Act was enacted, benefited from refusing to accept Chris-Craft's $65 cash tender offer in January. Subsequent offers for their shares on the New York Stock Exchange and by both Chris-Craft and Bangor Punta were substantially higher than $65, reaching over $80 by August 1969 (see Main Br., p. 39).

b. Chris-Craft was not injured as a result of the January communications. After Chris-Craft's cash tender offer in January, Chris-Craft admittedly was still able thereafter either to obtain control or to dispose of its shares without loss and possibly some profit (see Main Br., p. 32). It was not until May 1969, when Chris-Craft found that Bangor-Punta "seemed to be succeeding" (R1340A) in its efforts to acquire control of Piper Aircraft, that Chris-Craft first claimed it was injured in January in its quest for control (see Main Br., pp. 39, 41, 47).

c. The $36 million judgment for "damages" awarded Chris-Craft was premised on Bangor Punta obtaining control thereby denying it to Chris-Craft. Until Bangor Punta acquired more than 50% of the shares Chris-Craft was in a position to do so itself. Instead of competing in the marketplace it "withdrew from the struggle" (A-18) and sought a "bail-out" (A-160) from the courts. Even if the 230,000 shares acquired by Bangor Punta allegedly in violation of Rule 10b-6 and Section 14(e) arithmetically gave Bangor Punta control, the Piper individuals did not participate in those alleged violations (see Main Br., pp. 9, 14, 34, 41-42).

The only acts of the Piper individuals in January 1969 complained of did not cause the damage for which Chris-Craft is now being compensated (see Main Br., p. 47).

6. Chris-Craft acknowledges these fatal weaknesses in its case against the Piper individuals by suggesting that the Piper individuals did not place their alleged violations of Section 14(e) in issue in this Court (Chris-Craft Br., p. 31). The position of the Piper individuals from the outset has been that the January 27 and 28 letters to shareholders and the January 29 Grumman press release were not in violation of Section 14(e).* Those communications were found by the trial court not to be materially misleading. It was only on appeal, without the benefit of observing the witnesses who testified concerning them, that the Court of Appeals decided they were misleading as a matter of law. That erroneous determination comprised the sole underpinning of the Court of Appeals' liability and damage decisions. Hence, whether the Piper individuals violated Section 14(e) is clearly a subsidiary question fairly comprised within the questions presented (see this Court's Rule 40.1(d)1). Indeed, it is the very questionable nature of the Court of Appeals' finding of violations that undermines Chris-Craft's standing and the liability, causation and damage determinations against the Piper individuals.

ARGUMENT

The Piper individuals did not violate Section 14(e) nor did their actions cause Chris-Craft damage.

Piper Aircraft management's "conviction" or "belief" that Chris-Craft's limited cash tender offer was inadequate was true. Communicating that opinion to shareholders did not violate Section 14(e). Illustrative of Chris-Craft's tactic throughout this proceeding is its misstatement of the record on this issue.

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* Since these are the only communications upon which the liability of the Piper individuals was based, they are reproduced in full in the Addendum to this brief.

The Inadequacy of the Cash Tender Offer

At the trial Chris-Craft claimed that the January 27 and 28 letters to shareholders giving management's opinion that the Chris-Craft tender offer was "inadequate and not in the best interests" of shareholders, were misleading because they could only be considered as referring to the price (A-135). Chris-Craft argued that the statement was misleading since First Boston "had advised" Piper Aircraft that the $65 *price* was fair. The record on this "advice" consists of the deposition testimony of Mr. Miller of First Boston that he orally informed W. T. Piper, Jr. of his own personal opinion that the price, not the offer, was a fair price to an individual tendering shareholder unless a better alternative was available (R.Ev. 453-454, 460). Mr. Miller made it clear at this deposition, however, that the term "fair" meant a "fairly high" price (R.Ev. 467) but that regardless of the price the offer itself, because limited to 300,000 shares, was inadequate (R.Ev. 465, 467). That is precisely what the January 27 and 28 letters to shareholders said (see Addendum, pp. 17, 19).

The trial court exercising its function as trier of fact rejected Chris-Craft's claim that this was a material misrepresentation (A-135-A-136), but the Court of Appeals chose to reject the trial court's findings and substitute its own. It held that a shareholder "most likely would assume that the reference was to price," hence the Piper individuals violated Section 14(e) because they were not "more specific" (A-38). On the appeal from the remand the Court of Appeals reversed the district court's damage calculation, and subtly—but erroneously—attempted to modify its earlier decision. It did so by stating that the January 27 and 28 letters failed to reveal First Boston's opinion that Chris-Craft's *offer* was "fair and equitable" (B-9).

Thus, Mr. Miller's personal view that the $65 price was "fairly high" has been distorted first into a claim that

First Boston had advised that in its opinion the *price* was "fair" (A-135); then that the *price* was "fair and equitable" (A-38); and now that the *offer* was "fair and equitable" (B-9). The record clearly belies the claim.

The Propriety of the Grumman Transaction

With respect to the Grumman transaction, at trial Chris-Craft claimed it was a hoax entered into solely to interfere with Chris-Craft's tender offer. The District Court, after observing the witnesses at trial found that the transaction was not a sham (A-136). The Court of Appeals agreed (A-39) but faulted the Piper individuals for not fully describing all the provisions of the Grumman agreement. It made its own findings in the form of an assumption that the repurchase provisions in the agreement were "likely to affect the attitude" of Piper Aircraft shareholders towards Chris-Craft's tender offer (A-40).

Chris-Craft does not attempt to support that assumption. Instead it reiterates its claim that the Grumman transaction was a hoax despite the contrary findings in the courts below. It asserts that the material misrepresentation consisted of portraying "the Grumman agreement as a completely favorable deal" (Chris-Craft Br., p. 75). That is not what the Court of Appeals held. It could not do so.

The provisional nature of the Grumman transaction was clearly described in the press release. It merely provided "an opportunity for Grumman and Piper to study the feasibility and advantages of a possible combination of the two companies" (R266A; Addendum, p. 21). Moreover, the release clearly stated that the "agreement is subject to various conditions" (R267A; Addendum, p. 21). Thus, rather than portraying the transaction as all but complete its tentative nature was clearly set forth as an opportunity to study a possibility.

In essence, Chris-Craft's position—which the Court of Appeals adopted—is that the January communications had

to be as detailed and prolix as a registration statement or proxy solicitation in order to comply with the low standard of materiality espoused. That standard ignored the circumstances and the total mix of information made available; instead it focused microscopically on only one of the many conditions of the agreement (see R274A-275A).

The Improper Materiality Standard Applied

Since the filing of the Piper individuals' Main Brief, this Court decided *TSC Industries, Inc.* v. *Northway, Inc.*, 96 S.Ct. 2126 (1976). It observed with respect to proxy statements (at p. 2132): "Some information is of such dubious significance that insistence on its disclosure may accomplish more harm than good." If the standard of materiality is set so low "not only may the corporation and its management be subjected to liability for insignificant omissions or misstatements, but also management's fear of exposing itself to substantial liability may cause it simply to bury the shareholder in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking." (*Id.* at 2132-2133.) In view of the speed with which cash tender offers and responses thereto are made, the standard of materiality applied here will assure that shareholders will be inundated with such trivia.

As this Court observed when discussing the legislative purpose behind the Williams Act in *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975), "Congress intended to do no more than to give incumbent management an opportunity to express and explain its position." The position of Piper Aircraft's management here was simple and clear. Chris-Craft was not, in its opinion, an acceptable company to operate an aircraft manufacturing enterprise (see Main Br., pp. 6-7; see also B-60-B-62). Chris-Craft does not challenge the appropriateness of that opinion. Shareholders were entitled to be informed of it. As the Senate Report on the Williams Act notes, "if the

offer is for less than all the outstanding shares, perhaps only a part of them will be taken. In these instances he will remain a shareholder in the company, under a new management which he has helped to install without knowing whether it will be good for the company." S.Rep. No. 550, 90th Cong., 1st Sess., p. 2 (1967).

Management also believed that the tender offer was inadequate because limited.* That belief is not challenged —indeed, subsequent events proved it to be factually true (see Main Br., pp. 38-39). Accordingly, in the January 27 and 28 letters management expressed and explained its position (see Addendum, pp. 17-20). There was no need to engage in a lengthy discussion explaining that an individual shareholder, because of his own particular circumstances, might be willing to accept the $65 whereas others might not. This was a decision which each shareholder had to make for himself.** This was a decision which each shareholder in fact made for himself.

There is not one shred of evidence in the record supporting the speculation that shareholders did not tender to Chris-Craft because of anything said in those communications. Indeed, if anything, the record supports the trial court's finding of lack of materiality and reliance. Those shareholders who did not tender to Chris-Craft on its cash tender offer in January did not do so for reasons unrelated

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* The Court of Appeals' finding that "Since CCI had decided by the time of the cash tender offer that its objective was to win control of Piper, it clearly was willing to accept as many shares as it could obtain" (A-61), if correct, gives judicial sanction to the misrepresentation by Chris-Craft that its offer was limited and that it had no specific intention to acquire control by the tender offer (see Main Br., p. 31). Piper Aircraft's management's letters commenting on the inadequacy of the offer were sent on the assumption that these statements were true.

** For example, shareholders who purchased stock during the preceding year when Piper Aircraft shares traded for over $65 (see R251A) would not tender because of the loss while others would want a tax loss for personal reasons.

to the January communications. The record demonstrates that shareholders considered the prospect (a) that a control battle would develop which would drive the price higher—precisely what happened (R651A; R.Ev. 750-751); (b) that a higher offer would be made—which is what Chris-Craft's own witness testified would happen (R852A); and (c) that a competing offer would be made—again precisely what happened here.

Under these circumstances it is inconceivable that the kind of specificity demanded by the Court of Appeals here "would have assumed actual significance in the deliberations of the reasonable shareholder." *TSC Industries, Inc.* v. *Northway, Inc., supra,* 96 S.Ct. at 2133. Indeed, we respectfully submit that the "total mix" of information available to a shareholder deciding whether or not to accept $65 in cash for his stock would not have been significantly altered had the January communications said what the Court of Appeals faulted them for not saying.

The trial court, which heard the witnesses, found that such information was not material to the Piper Aircraft shareholders when deciding whether to accept or reject Chris-Craft's January tender offer (A-135-A-137). The Court of Appeals reversed and found materiality as a matter of law (A37-A40). This Court, however, just recently held that the determination of materiality "requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact". *TSC Industries, Inc.* v. *Northway, Inc., supra,* 96 S.Ct. at 2133.

As discussed in our main brief (pp. 26-27)—but ignored by Chris-Craft—Piper Aircraft shareholders took advantage of all the opportunities available to them: some tendered to Chris-Craft; some sold on the New York Stock Exchange; some did not tender during the tender offer but subsequently sold on the New York Stock Exchange for

prices higher than $65 or tendered to Bangor Punta or to Chris-Craft and received a package of securities valued higher than $65. The trial court specifically found that "in terms of price to tendering shareholders" Piper Aircraft management's "efforts to procure a better alternative for Piper shareholders" were "successful" (A-136). Shareholders were given sufficient information to permit them to make informed judgments during the tender offer. The purpose behind the Williams Act was fully satisfied here.

The Absence of Proof of Scienter By Any Standard

Chris-Craft attempts to impute scienter to the Piper individuals by distorting the record. Mr. Miller's personal belief that $65 was fairly high and might be acceptable to an individual tendering shareholder but that the offer as a whole was inadequate was all that was known. It was also known that under the Grumman agreement, Grumman had the right after six months to require Piper Aircraft to find another buyer for the shares or repurchase them if merger discussions proved unfruitful. The Court of Appeals held that such knowledge coupled with the court's assumptions made the information material. The assumptions were (1) that a shareholder "most likely would assume" that calling the offer inadequate was a reference to price and (2) that knowledge of certain terms of the Grumman agreement "was likely to affect the attitude" of shareholders towards Chris-Craft's tender offer. Based upon these assumptions, the Court of Appeals found the necessary scienter.

The record is devoid of any suggestion that the Piper individuals made the same assumptions. Yet, knowledge of the facts plus the Court of Appeals' assumptions were bootstrapped into knowledge that the shareholder letters were materially misleading (A-38) and a reckless disregard of an obligation to shareholders (A-40). This, in

turn, was bootstrapped into a finding by the Court of Appeals in a footnote (A-68, n. 31) that the Piper individuals were acting "not on behalf of the corporation in committing their illegal acts, but in their own individual interests." The trier of fact who saw and heard the witnesses interpreted the evidence differently, drew contrary inferences and concluded that there was no wrongful conduct. Since the complaint against the corporation was dismissed the District Court found that the complaint against the Piper individuals must be dismissed *"a fortiori"* (A-161).

Piper management has never denied that had it not been for Chris-Craft's takeover attempt they would not have sought other merger partners in January 1969. Chris-Craft is just plain wrong when it asserts: "Since Piper's president admitted that the Grumman affair was designed to injure Chris-Craft, scienter was conceded" (Chris-Craft Br., p. 78).* The Grumman affair was not held to have injured Chris-Craft. Even the Court of Appeals could "find no fault" in the Grumman transaction (A-39). All that the Court of Appeals found was that the Grumman press release failed "to disclose with substantial accuracy a transaction which was likely to affect the attitude of Piper shareholders toward the [Chris-Craft] tender offer" (A-40). The determination on appeal that a fuller explanation "was likely to affect the attitude" of shareholders is a far cry from finding that the information was withheld in order to—or even knowing that it would—mislead shareholders so that they made an uninformed decision with respect to Chris-Craft's tender offer. Chris-Craft never denies that those shareholders who did not tender made the right decision. They were not harmed since they subsequently received more for their shares (see Main Br., p. 39).

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* Since no court ever held that the Piper individuals uttered any falsehoods during Chris-Craft's tender offer or otherwise, Chris-Craft's gratuitous distortion that "they were not free to lie to achieve their objectives" (Chris-Craft Br., p. 78) warrants no further comment.

The Complete Absence of Any Proof of Causation in Fact

Chris-Craft never disputes that it failed to prove that anything occurring in January caused its claimed injury (see Main Br., pp. 31-35). The most it claims is that absent the January communications it would have been leading in the contest (Chris-Craft Br., p. 80). What it neglects to mention is that it was leading in the contest as late as May 14, 1969 (see Main Br., Addendum I, p. 1a). To the extent that it lost the lead thereafter, that loss was not due to anything done by the Piper individuals.

Thus, as a last resort Chris-Craft falls back on the "fanciful assumption" amounting to "rank speculation" (A-115) that there was some sort of "continuing adverse impact on Chris-Craft's later offer to Piper shareholders" (Chris-Craft Br., p. 89). Chris-Craft does not deny, however, that between the close of its cash tender offer in February and the opening of its exchange offer in May over two million shares of Piper Aircraft stock traded on the New York Stock Exchange (see Main Br., p. 44, n.*). Such a trading volume hardly demonstrates continuing reliance by shareholders on Piper Aircraft management's advice.

Chris-Craft's refusal even to address Section 28(a) of the 1934 Act demonstrates its failure to establish that the acts of the Piper individuals complained of caused Chris-Craft any damages. Nowhere in its discussion of causation (Chris-Craft Br., pp. 79-86) does it indicate how, if at all, the January communications caused its damages.

Its newly adopted "continuing adverse impact" theory is a slim reed indeed to support a $36 million judgment. The theory never meets Chris-Craft's "burden of establishing the traditional prerequisites of relief" *Rondeau* v. *Mosinee Paper Corp., supra,* 422 U.S. at 63. It certainly does not comport with the requirement of *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375, 389 (1970), that "damages should be recoverable only to the extent that they can be shown."

As we pointed out in our Main Brief (p. 47), Chris-Craft never showed what damages it suffered by being denied the opportunity to purchase additional shares on its tender offer. It does not even pretend that it made such a showing. Instead, it claims that its damages were the "destruction of its $60 million investment" (Chris-Craft Br., p. 94). Even the Court of Appeals considered Chris-Craft's investment to be only $44 million (A-18) for which it was awarded "damages" of $36 million. Nothing in the record suggests that Chris-Craft's 697,495 shares, amounting to 42.4% of Piper Aircraft's outstanding shares, were only $8 million in September 1969, January 1970 or even April 1975.

Conclusion

For the reasons stated in this Reply Brief and in our Main Brief, the judgment of the Court of Appeals should be reversed and the judgment of the District Court dismissing the complaint against the Piper individuals should be reinstated.

Respectfully submitted,

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New York, New York 10020
Counsel for Petitioners

CHADBOURNE, PARKE, WHITESIDE & WOLFF
Of Counsel

September 23, 1976.

ADDENDUM

PIPER AIRCRAFT CORPORATION
Lock Haven, Pennsylvania 17745

IMPORTANT

January 27, 1969

DEAR SHAREHOLDER:

In an attempt to gain control of your Company, Chris-Craft Industries, Inc., a small New York based conglomerate, has offered to purchase 300,000 shares of Piper Common Stock at $65 per share.

Your Board of Directors has carefully studied this offer and is convinced that it is inadequate and not in the best interests of Piper's shareholders. Accordingly, your Board unanimously urges that it be rejected. **Not one member of your Board of Directors or management will tender his shares.**

Obviously, if Chris-Craft is suddenly willing to offer you $65 per share for your shares, Chris-Craft must believe that Piper stock is worth substantially more than it is offering.

Remember, any tender of your shares will be irrevocable on or after January 30, 1969. In other words, after this date your shares could be out of your possession and control until March 24, 1969 and without any payment to you.

In addition, this offer is conditioned on your surrendering to Chris-Craft an irrevocable proxy for the annual meeting on February 4, 1969. Your management believes this is a solicitation of proxies without proper compliance with the federal securities laws and has referred the matter to counsel.

In your own interest, we urge you to consider carefully the following important points:

1. This offer is a fully taxable transaction.

2. Piper's stock has traded as high as $72.25 on the New York Stock Exchange within the past eight months.

3. Piper's sales increased more than 20% in fiscal 1968 over the prior year, and its earnings per share were approximately 29% higher.

4. The general aviation industry is a growth industry, and Piper expects to participate fully in this growth.

You should know that Piper's management has had preliminary discussions with several major industrial corporations regarding possible combination with Piper. These are continuing. In the opinion of your Board of Directors and management, if a merger or consolidation were deemed advisable, a higher value could be realized for all shareholders and possibly on a tax-free basis. Any shareholder who has tendered his shares will not, of course, benefit from any such development.

For these reasons, your Board of Directors again strongly recommends that you reject the Chris-Craft offer.

We will forward additional important information to you within the next several days. If I can be of further assistance to you, please do not hesitate to call me collect at (717) 748-6711.

Sincerely,

s/ W. T. Piper, Jr.
W. T. Piper, Jr.
President

Piper Aircraft Corporation

Lock Haven, Pennsylvania 17745

January 28, 1969

Dear Shareholder:

In our letter of January 27, 1969, the Board of Directors unanimously urged you to reject the tender offer, conditioned upon an "irrevocable" proxy, by Chris-Craft Indutries, Inc. Your Management firmly believes this offer is inadequate and not in the best interests of Piper shareholders.

The annual meeting of shareholders of Piper will be held Tuesday, February 4, 1969 to elect directors and approve the selection of independent auditors. All shareholders as of the record date, January 3, 1969, are entitled to vote at this meeting. Since the directors are to be elected on a cumulative voting basis it is important to have as high a representation as possible at the meeting.

Chris-Craft has announced that it has purchased 200,500 shares of Piper previous to its tender offer "with a view to control of Piper". In addition, Chris-Craft has stated that if its offer is successful it would then plan to combine Chris-Craft and Piper. Since Chris-Craft's offer, which expires on February 3, 1969, asks for an "irrevocable" proxy for the annual meeting to be held the following day, Chris-Craft would then be in a position to elect its own representatives to your Board of Directors. *If Chris-Craft then continued its plan to combine Chris-Craft and Piper, Chris-Craft in effect would be dealing with itself or its own representatives.* Certainly the fiduciary duty of Piper's Board of Directors is to the Piper shareholders. On the other hand, the fiduciary duty of Chris-Craft's directors or representatives would be to Chris-Craft's shareholders—*not to you.*

Your Board of Directors and Management firmly believe that Chris-Craft's offer is the first step in a plan to gain control of Piper and then merge Piper into Chris-Craft Industries rather than dealing on an arm's-length bargaining basis.

In your own best interests, we urge you to support your present independent Board of Directors. Regardless of the number of shares you may own please sign, date and mail your proxy today.

We will continue to keep you informed.

Sincerely,

s/ W. T. Piper, Jr.
W. T. Piper, Jr.
President

NEWS FROM PIPER

Piper Aircraft Corporation - Public Relations Department - (717) 748-6711 Lock Haven, Pa.
New York Public Relations Office - Suite 1106, 52 Vanderbilt Avenue, N.Y. - (212) 686-3331

FOR RELEASE January 29, 1969

New York, N.Y.—January 29, 1969. Grumman Aircraft Engineering Corporation has agreed to purchase 300,000 shares of Piper Aircraft Corporation's authorized but unissued common stock at $65 per share, according to an announcement by E. Clinton Towl, Chairman of Grumman, and William T. Piper, Jr., President of Piper. The agreement is subject to the approval of the respective Boards of Directors of the two companies, both of whom are scheduled to meet on Thursday, January 30, 1969, to consider the transaction.

Mr. L. J. Evans, President of Grumman, said the purchase provides an opportunity for Grumman and Piper to study the feasibility and advantages of a possible combination of the two companies. He added that Grumman has been carefully studying the potential of the general aviation industry and the possibility of further diversification into commercial business, not only in the aircraft industry but in other fields.

Mr. Piper stated that his firm, a manufacturer of a wide assortment of corporate and private aircraft models for the commercial market, would expect to benefit materially from its association with Grumman in the areas of finance, production capability and technology.

The sales agreement is subject to various conditions, including that the shares be listed on the New York Stock Exchange, that there be no material adverse change in the business of Piper, and that there be no change in control of Piper.

Certificate of Service.

I hereby certify that three copies of the foregoing Reply Brief for Petitioners were served by hand this 23rd day of September on Arthur L. Liman, Esq., 345 Park Avenue, New York, New York 10022, counsel for Respondent. I further certify that all parties required to be served have been served.

Dated: September 23, 1976.

ZACHARY SHIMER
Counsel for Petitioners
30 Rockefeller Plaza
New York, New York 10020

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